No. 06-8273

Title:	Stephen Danforth, Petitioner
	v.
	Minnesota
Docketed:	December 12, 2006
Lower Ct:	Supreme Court of Minnesota
Case Nos.:	(A04-1993)
Decision Date:	October 10, 2006

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 6 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 11, 2007)
Dec 19 2006	Waiver of right of respondent Minnesota to respond filed.
Jan 4 2007	DISTRIBUTED for Conference of January 19, 2007.
Jan 10 2007	Response Requested . (Due February 9, 2007)
Feb 12 2007	Brief of respondent Minnesota in opposition filed.
Feb 14 2007	Reply of petitioner Stephen Danforth filed.
Mar 1 2007	DISTRIBUTED for Conference of March 16, 2007.
Mar 20 2007	DISTRIBUTED for Conference of March 23, 2007.
Mar 20 2007	Further Response Requested directed specifically to the following question: Are state supreme courts required to use the standard announced in Teague v. Lane, 489 U. S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by Teague? (Due April 19, 2007)
Apr 18 2007	Supplemental response of respondent Minnesota filed.
Apr 26 2007	Supplemental reply of petitioner Stephen Danforth filed.
May 2 2007	DISTRIBUTED for Conference of May 17, 2007.
May 21 2007	Motion to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.
Jun 6 2007	Joint appendix filed. (Statement of costs received)
Jun 21 2007	The time within which to file petitioner's brief on the merits is extended to and including July 19, 2007.
Jul 17 2007	Brief amici curiae of American Civil Liberties Union, et al. filed.
Jul 19 2007	Brief of petitioner Stephen Danforth filed.
Jul 19 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.

Jul 19 2007	Brief amici curiae of Kansas, et al. in support of neither party filed.
Aug 23 2007	Brief of respondent Minnesota filed.
Aug 23 2007	Brief amici curiae of Alaska, et al. filed.
Aug 25 2007	CIRCULATED.
Aug 30 2007	SET FOR ARGUMENT Wednesday, October 31, 2007.
Sep 5 2007	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Sep 11 2007	Petitioner's opposition to motion of Kansas, et al. filed.
Sep 25 2007	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Sep 25 2007	Record received from the Supreme Court of Minnesota. (1 envelope)
Sep 27 2007	Reply of petitioner Stephen Danforth filed. (Distributed)
Oct 18 2007	Record received from District Court of Minnesota, Fourth Judicial District (Hennepin County), (1 box).
Oct 31 2007	Argued. For petitioner: Benjamin J. Butler, Assistant Minnesota State Public Defender, Minneapolis, Minn. For respondent: Patrick C. Diamon, Deputy County Attorney, Minneapolis, Minn.

(6)

Dec 6, 2006

No. 06-8273

In the
SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 2006

Stephen Danforth, *Petitioner,*

v.

State of Minnesota, *Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?
2. Did *Crawford v. Washington*, 541 U.S. 36 (2004), announce a "new rule of constitutional criminal procedure," as *Teague* defines that phrase and, if it did, was it a watershed rule of procedure subject to full retroactive application?

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen Danforth respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Minnesota Supreme Court appears at appendix A to this petition. The court's opinion is published at 718 N.W.2d 451 (Minn. 2006).

JURISDICTION

The Minnesota Supreme Court issued its decision on July 27, 2006. A copy is attached at appendix A. The Minnesota Supreme Court entered final judgment on the appeal on October 10, 2006. A copy of the judgment is attached at appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Stephen Danforth was convicted by a jury in Minneapolis, Hennepin County, Minnesota, of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (1994), on March 6, 1996. (App. A-1). The conviction arose out of the alleged sexual abuse of J.S., then a six-year-old boy. (*Id.*). The district court judge found that J.S. was incompetent to testify at petitioner's trial. In lieu of live testimony subject to cross-examination, therefore, the jury saw and heard a videotaped interview of J.S. conducted at a "non-profit center." (*Id.*). During the interview, J.S. accused petitioner of sexually abusing him. (App. C-3).[1]

[1] The Minnesota Court of Appeals' opinion in petitioner's direct appeal is published at 573 N.W.2d 369 (Minn. Ct. App. 1997), and is attached at appendix C.

Petitioner appealed his conviction. Among other claims, he argued that the admission of the videotape of J.S.'s statement violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. (App. C-6). The Minnesota Court of Appeals considered the issue under the balancing test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), along with *Idaho v. Wright*, 497 U.S. 805 (1990), and attendant Minnesota caselaw. (App. C-6-7). The Court of Appeals affirmed the admission of the tape and the conviction, holding that "the videotape was sufficiently reliable to be admitted into evidence." (*Id.*). The Minnesota Supreme Court denied review and, following an appeal after a resentencing, petitioner's case became final in 1999.[2]

In 2004, this Court released *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court "impose[d] an absolute bar to [the admission of] statements that are testimonial, absent a prior opportunity to cross-examine [the declarant]." *Crawford*, 541 U.S. at 62. Believing that the statement at issue in his case was testimonial and thus was admitted in violation of his right of confrontation, petitioner, acting pro se, filed a second petition for postconviction relief to challenge his conviction.[3] The district court denied the petition and the Minnesota Court of Appeals affirmed. *Danforth v. State*, 700

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[2] In late 2000, petitioner filed a petition for postconviction relief to challenge his conviction and sentence. The petition was denied and it is not at issue here. *See Danforth v. State*, 2000 WL 1780244 (Minn. Ct. App. 2000), *rev. denied* (Minn. Feb. 13, 2001) (attached in Appendix E).

[3] *See Deegan v. State*, 711 N.W.2d 89, 93-96 (Minn. 2006) (discussing Minnesota's Post-Conviction Relief Act); *See* Minn. Stat. § 590.01, *et seq.* (2004) (providing for petitions for postconviction relief).

N.W.2d 530 (Minn. Ct. App. 2005). Petitioner petitioned for further review, and the Minnesota Supreme Court granted the petition and assigned him counsel.[4]

Petitioner encouraged the Minnesota Supreme Court to consider the issue of *Crawford*'s application to his case under a standard different from the one used in federal court to determine whether new rules of constitutional criminal procedure apply retroactively to cases pending on federal habeas corpus review. (App. A-4); *see also Teague v. Lane*, 489 U.S. 288 (1988). Petitioner argued that because the Minnesota Supreme Court has the authority to offer its citizens greater protections under the state constitution than those offered by the federal constitution, the court could apply *Crawford* to a broader class of cases than the class required by *Teague*. In the alternative, petitioner argued that *Crawford* applied to his case under the *Teague* standard. (App. A-4-5).

The Minnesota Supreme Court disagreed with both arguments. The court held that petitioner "is incorrect when he asserts that state courts are free to give a [United States] Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court." (App. A-5). Citing two of this Court's decisions, *American Trucking Associations v. Smith*, 469 U.S. 167, 178 (1990) (plurality opinion), and *Michigan v. Payne*, 412 U.S. 47, 49 (1973), as authority, the Minnesota court held that it "cannot apply state retroactivity principles when

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[4] During the course of these proceedings, petitioner has had a federal habeas corpus challenge to his conviction pending. The district court denied the petition but granted petitioner a certificate of appealability to the United States Court of Appeals for the Eighth Circuit on the *Crawford* issue. *Danforth v. Crist*, 2005 WL 2105502 (D. Minn. Aug. 26, 2005). The undersigned does not represent petitioner in that process.

determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles." (App. A-5-6). The court recognized that several other state supreme courts had reached the opposite conclusion and noted that the policy concerns underlying *Teague* may not apply to state postconviction proceedings. (App. A-6-7). But ultimately, the court held that it was "not free to fashion [its] own standard of retroactivity for *Crawford*." (App. A-7).

Applying *Teague*, the Minnesota Supreme Court held that *Crawford* had announced a new rule of constitutional criminal procedure and that the rule was not a watershed rule. (App. A-7-14). Therefore, the court held that *Crawford* did not apply to petitioner's case. It affirmed the denial of his post-conviction petition. (App. A-14).

Petitioner now seeks a writ of certiorari from this Court on the two important questions presented in this case.

REASON FOR GRANTING THE PETITION

I.

THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER A STATE COURT MUST APPLY THE *TEAGUE* STANDARD WHEN DETERMINING THE RETROACTIVE EFFECT OF UNITED STATES SUPREME COURT DECISIONS, OR WHETHER STATE COURTS MAY USE A BROADER STANDARD FOR RETROACTIVE APPLICATION.

Deepening a split of authority in the state courts, the Minnesota Supreme Court held that it was absolutely prohibited from applying any test for retroactive application of new rules of federal constitutional criminal procedure other than the test announced in *Teague v. Lane*, 489 U.S. 288, 310 (1989). This Court should grant certiorari in this case because this important issue, a question of federal law, is subject to an intractable split of authority in the lower courts and it has not been, but should be, resolved by this Court. U.S. Sup. Ct. Rule 10.

A. The *Teague* Standard Is Based on Principles Unique to State Cases Being Considered Under Federal Habeas Corpus Review.

In *Teague v. Lane* and subsequent decisions, this Court announced and applied a test for determining whether the holding of one of this Court's cases could be applied retroactively to cases pending on federal habeas corpus review. This Court recently summarized the test as follows:

> Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process. First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually new. Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411 (2004) (citations omitted).

> In *Teague*, the Supreme Court, instead of focusing on the purpose and impact of a new constitutional rule, looked to the function of federal habeas review, which is to ensure that state courts conscientiously follow federal constitutional standards. The Court determined that this function is met by testing state convictions against the constitutional law recognized at the time of trial and direct appellate review,...[.] Therefore, once a conviction has become final, federal courts should generally not interfere with the state courts by applying new rules retroactively.

Colwell v. State, 59 P.3d 463, 470 (Nev. 2002) (citations omitted). The *Teague* Court based the test upon its conclusion that "the interests of comity and finality" precluded a federal court from altering a state court conviction based upon a newly announced rule of federal constitutional law. *Teague*, 489 U.S. at 308. The Court was also concerned with the "costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus." *Id.* at 310 (quotation omitted). Finally, the Court recognized that "'[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Id.* (quoting *Engle v. Isaac*, 456 U.S. 108, 128 n. 33 (1982)).

B. There is a split of authority over whether state courts are required to use the *Teague* standard or whether they are free to fashion their own broader test retroactive application of United States Supreme Court decisions.

Given that the reasons behind the *Teague* test apply primarily, if not exclusively, to federal habeas corpus cases, many state courts have declined to use the *Teague* standard and instead have considered the retroactive effect of this Court's holdings under their own, broader tests. *See Smart v. State*, ___ P.3d ___, 2006 WL 3042821 (Alaska

App. Oct. 27, 2006); *Hughes v. State*, 901 So.2d 837, 839-48 (Fla. 2004); *State v. Whitfield*, 107 S.W.3d 253, 266-68 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 470-71 (Nev. 2002), *cert. denied*, 540 U.S. 981 (2003); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296-97 (La. 1992), *cert. denied* 508 U.S. 962 (1993); *Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990); *Cowell v. Leapley*, 458 N.W.2d 514, 517-18 (S.D. 1990); *see also State v. Forbes*, 119 P.3d 144, 148-49 (N.M. 2005) (holding that *Crawford* did not announce a new rule but only as applied to defendant at issue, who had argued for *Crawford*'s definition of "testimonial" on direct appeal); Hon. Laura Denvir Stith, A Contrast of State and Federal Court Authority to Grant Habeas Relief, 38 Val. U. L. Rev. 421, 438-49 (2004) (arguing that states are free to use retroactivity standards other than *Teague* to afford retroactive application of United States Supreme Court decisions to boarder class of defendants). As authority for their holdings, many of those courts relied upon this Court's pre-*Teague* statement that states are "entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by" the Supreme Court's interpretation of the federal constitution.[5] *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966).

In addition, these courts rely upon the longstanding rule that state courts are permitted to interpret their state constitutions to provide greater freedoms to their citizens than those provided by the federal constitutions. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *see also Brigham City, Utah v. Stewart*, 547 U.S. ___, ___, 126 S.Ct. 1943,

[5] *See, e.g., Colwell*, 59 P.3d at 470-72; *State v. Fair*, 502 P.2d 1150, 1151 (Or. 1972), *overruled by Page v. Palmateer*, 84 P.3d 133, 138 (Or. 2002).

1950-51 (2006) (Stevens, J., concurring) (discussing state supreme court's authority to provide greater protections under state constitution than those afforded by federal constitution). Part of that freedom, the courts cited above have concluded, is the freedom to provide relief to a larger class of criminal defendants than that required by *Teague*. *See, e.g. Colwell*, 59 P.3d at 470 (rejecting *Teague* standard because "*Teague* is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions."); *State v. Fair*, 502 P.2d 1150, 1152 (Or. 1972) (holding that state courts "are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires"), *overruled by Page v. Palmateer*, 84 P.3d 133, 138 (Or. 2004), *cert. denied*, 543 U.S. 866 (2004).

Other state courts, now including the Minnesota Supreme Court, have concluded that they do not have the authority to use a broader test for retroactive application of this court's decisions. (App. A-5-7); *Page v. Palmateer*, 84 P.3d 133, 137-38 (Or. 2004); *State v. Egelhoff*, 900 P.2d 260, 267 (Mont. 1995). Those courts have relied upon this Court's decisions in *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), *Oregon v. Hass*, 420 U.S. 714, 719 (1975), and *Michigan v. Payne*, 412 U.S. 47 (1973), for the proposition that they "cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles." (App A-5-6); *see also Page*, 84 P.3d at 137-38 (distinguishing between rules of state and federal constitutional law and

holding that it was not "free to determine the degree to which a new rule of federal constitutional law should be applied retroactively"). These courts did not simply decide to apply the *Teague* standard as a matter of comity or policy.[6] Instead, they held that they were forced by this court's decisions to apply *Teague*. (App. A5-7); *Page*, 84 P.3d at 138.

The split of authority on this issue is large and intractable. The issue of whether a state court must use the *Teague* standard has been decided different ways by courts in no fewer than twelve states. Only the United States Supreme Court can resolve this issue. The question of whether state-courts are required to use the *Teague* standard to determine the retroactive effect of Supreme Court decisions in state courts is a question of federal law. *See American Trucking*, 496 U.S. at 177-78. But the lower federal courts are unlikely to be in a position to resolve this question, thanks to the numerous procedural and substantive barriers surrounding federal habeas corpus petitions. The most daunting such barrier is the requirement that any state-court decision must be "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," before habeas relief can be granted. 28 U.S.C. § 2254(d)(1) (2005). This Court has never decided the question of whether state courts are bound to apply *Teague* and state courts can find support in this Court's caselaw for the proposition that they are and are not so bound. It is highly unlikely, therefore, that a federal court sitting in judgment of a habeas petition can resolve this issue.

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[6] Indeed, the Minnesota court recognized that the *Teague* standard was based upon "different policy concerns" than those facing state-court judges reviewing state-court decisions, but nonetheless held that it was compelled to follow *Teague*. (App. A-6-7).

At least one state supreme court has already used its perceived power to amend the standard of retroactive application to afford greater protections to one of its citizens on this very issue – the retroactivity of *Crawford*. The New Mexico Supreme Court held that *Crawford* applied retroactively to a case that became final in 1987. *Forbes*, 119 P.3d at 147-49.[7] In the mid-1980s, the New Mexico court had agreed with the defendant, Ralph Earnest, that testimonial hearsay was inadmissible in criminal trials, only to be reversed by this Court. *Forbes*, 119 P.3d at 146. In *Forbes*, the New Mexico court held that *Crawford* did not announce a "new rule" when applied to the case before it. The court so held for equitable reasons:

> Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him to the same new trial he should have received back then.

Id. at 148-49; *see also Id.* at 146 ("It is beyond dispute that since *Crawford*, the rest of the nation knows now what the New Mexico Supreme Court announced in 1985").

The decision in *Forbes*, in which a state supreme court awarded retroactive application to a criminal defendant of a United States Supreme Court decision as a matter of equity, cannot be squared with the Minnesota Supreme Court's holding in this case: that state courts are not free to apply any retroactivity standard other than *Teague* to United States Supreme Court decisions. If the supreme courts of Minnesota, Oregon, and Montana are correct, and a state court has no authority to apply state retroactivity principles to Supreme Court decisions on federal constitutional rights, then the New

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[7] A petition for writ of certiorari in *Forbes* is pending before this Court. *See New Mexico v. Forbes*, U.S. Sup. Ct. File No. 05-644.

Mexico court's decision in *Forbes* is wrong. But if, on the other hand, state courts are "free to effectuate under their own law [broader retroactivity standards and to] apply those standards in a broader range of cases than is required by" *Teague*, *Johnson* 384 U.S. at 733, then the New Mexico court's decision in *Forbes* is justifiable, and the Minnesota Supreme Court's decision in this case is not. Either the New Mexico Supreme Court overstepped its bounds or the Minnesota Supreme Court unnecessarily constrained itself. This Court should accept certiorari over this case to determine which is correct.

The only way for the split of authority on this important issue to be resolved is for this Court to resolve it. This Court should accept certiorari over this case to resolve the split of lower-court authority on this important issue.

C. The question of whether state courts are bound to apply *Teague* is vitally important to every state court in the country.

The question of whether a state supreme court is bound to apply the *Teague* test is a vitally important question of federal law, the answer to which will affect every state court in the country. Each term, this Court issues numerous criminal-law decisions, each one potentially affecting innumerable criminal prosecutions in this country. State courts, in which the vast majority of such prosecutions are based, need to know by which decisions they are bound and, alternatively, how much power they have to provide greater protections to their citizens than the protections afforded by the federal constitution. This Court has always shown "[r]espect for the independence of state courts," and has recognized that "[i]t is fundamental that state courts be left free and unfettered by [this Court] in interpreting their state constitutions." *Long*, 463 U.S. at 1040-41. The Court should accept certiorari over this case to ensure that state courts are,

indeed, "free and unfettered" to apply this Court's decisions "in a broader range of cases than is required by" *Teague*. *Id.*; *Johnson*, 384 U.S. at 733. Right now, at least two states do not feel so free or so unfettered.

In addition, this Court should accept certiorari over this case to resolve any inconsistencies in its own caselaw. The state courts that have concluded that they are free to fashion their own retroactivity standards have relied on one line of cases from this Court; a line that includes *Johnson* and *Long* and stands for the proposition that state supreme courts are free to interpret their own constitutions in ways that give greater protections to their citizens than those afforded by the federal constitution. Other state supreme courts, including the Minnesota Supreme Court in this case, have relied upon a line of cases that include *American Trucking*, *Payne*, and *Hass*; cases that stand for the proposition that the retroactive effect of this Court's decisions involve only questions of federal law, not state law, and that state law does not apply.

If the latter were true, however, one would think that claim that an issue was *Teague*-barred would be nonwaivable. But this Court has repeatedly held that the *Teague* rule simply created a procedural defense that state governments might raise in a habeas proceeding that this defense was forfeited if the state did not raise it in a timely manner. *See Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (noting that state did not assert *Teague* as a defense in a timely manner); *Godinez v. Moran*, 509 U.S. 389, 397 n. 8 (1993) (same); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (holding that *Teague* rule is not "jurisdictional" and accepting state's waiver of any *Teague* issue). Only this Court

can resolve any inconsistencies between these two lines of cases, and it should do so by accepting certiorari over this case.

The Minnesota Supreme Court, and the other state supreme courts in the minority, have held that this Court's decisions have bound them to use the *Teague* standard when deciding whether to apply federal constitutional rules retroactively. But what happens if this Court holds that Congress can, or has, abrogated *Teague* altogether? In at least two cases this term, this Court is considering whether amendments to the federal habeas stature, 28 U.S.C. § 2254(d)(1) and (2), effectively abrogated the *Teague* standards. *See Wharton v. Bockting*, Sup. Ct. File No. 05-595; *Burton v. Stewart*, Sup. Ct. File No. 05-9222. If *Teague* is binding upon the states, and Congress can abrogate *Teague*, then can Congress prohibit state courts from applying United States Supreme Court decisions retroactively? Or, if Congress has abrogated *Teague*, has it already done so? The Court should grant certiorari over this case to answer these important questions.

Finally, this Court should grant certiorari in the interests of justice. This Court has granted certiorari in a number of cases to, in Justice Stevens' words, "make sure that a State's highest court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution." *Washington v. Recuenco*, 126 S.Ct. 2546, 2554 (2006) (Stevens, J., dissenting) (citing *Brigham City*, 547 U.S. ___, 126 S.Ct. 1943 (2006); *Kansas v. Marsh*, 548 U.S. ___, 126 S.Ct. 2516 (2006)). The issue presented here dovetails with Justice Stevens' concerns. In this case the Minnesota Supreme Court held that it could not "grant[]

its citizens any greater protection than the bare minimum required by" *Teague*. *Recuenco*, 126 S.Ct. at 2554 (Stevens, J., dissenting); (App. A-6-7). This Court should make sure that state supreme courts know to what extent they are free to interpret their own constitutions to provide greater protections to their citizens.

The primary purpose behind *Teague* was "to limit the scope of federal habeas corpus review of state criminal convictions." *Id.* at *13. It was not "to achieve uniformity of results among the fifty states." *Id.*; *see also* Mary C. Hutton, Retroactivity in the States: The Impact of *Teague v. Lane* on State Postconviction Remedies, 44 Ala. L. Rev. 421, 449-58 (1993) (arguing that states should follow broader retroactively principles than those announced in *Teague*; describing notion that states are bound to follow *Teague* as "mistaken"). The *Teague* standard was not designed for state courts, and it was certainly not designed to bind state courts. The Court should grant the petition for writ of certiorari on this issue.

II.

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE IF *CRAWFORD*'S HOLDING APPLIES TO PETITIONER'S CASE, THE IDENTICAL ISSUE PRESENTED IN THE PENDING CASE OF *WHORTON v. BOCKTING.*

The Minnesota Supreme Court affirmed petitioner's conviction because it held that *Crawford*, which was decided in 2004, did not apply to petitioner's case, which became final in September 1999. The Minnesota court considered the issue of *Crawford*'s retroactive application under the *Teague* standard and held that 1) *Crawford* had announced a new rule of constitutional criminal procedure; and 2) the rule was not a watershed rule. (App. A-7-14).

In 2004, a split panel of the United States Circuit Court of Appeals for the Ninth Circuit reached the opposite conclusion. *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2004), *op. amended, re'hrg en banc denied* 408 F.3d 1127 (9th Cir. 2005). Considering the same issue, a majority of the panel held that, even if *Crawford* had announced a new rule, it was a watershed rule of criminal procedure and was fully retroactive. *Bockting*, 399 F.3d at 1018. One of the panelists would have concluded that *Crawford* did not announce a new rule and therefore applied to all past cases. *Bockting*, 399 F.3d at 1022-24 (Noonan, J., concurring). Another panelist dissented and would have held that *Crawford* announced a new rule but not a watershed rule of procedure. *Id.* at 1024-41 (Wallace, J., dissenting).

This Court has issued a writ of certiorari in *Bockting*, presumably to determine (possibly among other things) *Crawford*'s retroactive effect under the *Teague* standard. *Whorton v. Bockting*, ___ U.S. ___, 126 S.Ct. 2017 (2006) (mem) (U.S. Supreme Court

File No. 05-595). Because Minnesota feels compelled to use the *Teague* standard to determine the retroactive effect of *Crawford* and this Court's other decisions, the decision in *Bockting* could control the outcome of petitioner's case. Only by granting this petition can the Court assure that petitioner will benefit from its ruling. As an alternative to granting the petition on the merits of the first issue presented, this Court should grant the petition and consider staying any further proceedings until it renders a decision in *Bockting*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEB 12 2007

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN DANFORTH,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PROCEDURAL HISTORY

The issue central to this case is whether Petitioner Danforth is entitled to retroactive application of *Crawford v. Washington*, 541 U.S. 36 (2004). Simply put, if Appellant had a matter pending on direct review at the time the *Crawford* decision was issued, he is automatically entitled to relief. If, however, he exhausted his direct review remedies prior to *Crawford's* announcement, he then is entitled to relief only (a) via the application of *Teague v. Lane*, 498 U.S. 288 (1989) and (b) the retroactive application of the *Crawford* rule. With this background, the relevant procedural history is as follows:

March 6, 1996	Appellant was found guilty of Criminal Sexual Conduct in the First Degree.
May 13, 1996	Appellant was sentenced.
August 8, 1996	The State filed a Notice of Appeal of the sentence.
August 9, 1996	Appellant filed a Notice of Appeal contesting the conviction and a motion to consolidate his appeal with the sentencing appeal of the State.
December 16, 1997	Appellant's conviction was affirmed by the Minnesota Court of Appeals. The sentence, however, was reversed and the matter remanded for resentencing. On remand, the district court imposed a double upward durational departure of 316 months.
May 4, 1999	The sentence was affirmed by the Minnesota Court of Appeals.
July 28, 1999	The Minnesota Supreme Court denied Appellant's Petition for Review.

October 26, 1999	Appellant's time to seek United States Supreme Court review expired. *See* 28 U.S.C. § 2101(d).
March 8, 2004	The *Crawford* decision is announced.
July 27, 2006:	The Minnesota Supreme Court rejects retroactive application of *Crawford,* giving rise to the instant Petition for Writ of Certiorari.

The Minnesota Supreme Court summarized the procedural history as follows:

> Stephen Danforth was convicted of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (2004), on March 6, 1996. This conviction arose out of the sexual abuse of J.S., a 6-year-old boy. J.S. was found incompetent to testify at trial, but a videotaped interview of J.S. conducted at a non-profit center was admitted into evidence. On appeal, the court of appeals affirmed Danforth's conviction but remanded for resentencing. *State v. Danforth*, 573 N.W.2d 369, 371 (Minn. App. 1997) (*Danforth I*), *rev. denied* (Minn. Feb. 19, 1998). On remand, Danforth was sentenced to imprisonment for 316 months. The court of appeals affirmed this sentence on appeal. *State v. Danforth,* No. C5-98-2054, 1999 WL 262143, at *1 (Minn. App. May 4, 1999) (*Danforth II*), *rev. denied* (Minn. July 28, 1999). Alleging various trial errors, Danforth filed a petition for postconviction relief. The postconviction court denied the petition and the court of appeals affirmed. *Danforth v. State*, No. C6-00-699, 2000 WL 1780244, at *1 (Minn. App. Dec. 5, 2000) (*Danforth III*), *rev. denied* (Minn. Feb. 13, 2001).
>
> After the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004),and *Blakely v. Washington*, 542 U.S. 296 (2004), Danforth filed a second petition for postconviction relief alleging he was entitled to relief based on the rules established by those cases. The postconviction court denied Danforth relief, finding that neither *Crawford* nor *Blakely*

applied retroactively to Danforth's case; the court of appeals affirmed. *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. App. 2005) (*Danforth IV*). We granted review of the *Crawford* issue only and requested that the Office of the State Public Defender represent Danforth on this appeal.

Danforth argues that this court is free to apply a broader retroactivity standard than that of *Teague v. Lane*, 489 U.S. 288 (1989), and that he is entitled to the benefit of *Crawford* under *state* retroactivity principles. He also argues that, even using the framework of *Teague*, *Crawford* should be retroactively applied to his case. We reaffirm our holding in *State v. Houston*, 702 N.W.2d 268, 270 (Minn. 2005), that we are required to apply *Teague*'s principles when analyzing the retroactivity of a rule of federal constitutional criminal procedure. Because we conclude that, under *Teague*, *Crawford* does not apply retroactively to Danforth's case, we affirm

Danforth v. State, 718 N.W.2d 451 (Minn. 2006).

FACTUAL HISTORY

The Minnesota Court of Appeals summarized the facts of this case as follows:

> Danforth is a multiply-convicted pedophile with an extensive history of sexually abusing young boys during the 1970's and 1980's. Danforth and (victim) J.S.' parents, particularly J.S.' father, were close friends for many years; Danforth was like a "favorite uncle" to J.S. and his siblings, having spent a great deal of time with the family.
>
> On August 11, 1995, a neighbor discovered six-year-old J.S. with his pants down atop a younger girl, acting in a sexual manner. When confronted by his mother and asked where he had learned such things, J.S. said that "Steve" had put his mouth on J.S.' "pee-pee" and his finger in J.S.' "poopie butt." That evening, J.S.' mother called the police to report the alleged sexual abuse.
>
> When interviewed by the police, J.S. said that "Steve" had put his "pee" in his buttocks and that "Steve" had made him "kiss his pee." On August 23, 1995, J.S. was interviewed at CornerHouse, a non-profit sexual abuse center. J.S. gave substantially similar information during this videotaped interview and clearly indicated that he had been sexually abused by Danforth.
>
> The trial was lengthy, lasting from February 7 through March 6, 1996. Danforth, a disbarred attorney, represented himself for much of the trial, although he had access to stand-by counsel.
>
> On the day that testimony was scheduled to begin, a competency hearing was held to determine whether J.S. and his five-year-old sister, A.S., were competent to testify. Danforth strongly urged the district court to find J.S. incompetent and to rule the CornerHouse videotape inadmissible. The state agreed that J.S. appeared incompetent to testify, but argued that the videotape was nevertheless admissible. Because J.S.

had limited ability to focus on questions and give relevant answers, the district court declared him incompetent. The district court found A.S. competent to testify, however, because she exhibited a far superior ability to concentrate than J.S.

The district court admitted the videotape because it found the taped conversations bore sufficient indicia of reliability. Among other factors, the district court noted that J.S.' remarks appeared spontaneous and largely unsolicited by leading questions, and that J.S. lacked any apparent motivation to fabricate the accusation.

At trial, the jury viewed the CornerHouse videotape, and A.S. testified that she had seen "Steve" put his mouth on J.S.' "pee-pee" and "private" one day in the men's room by the pool at their aunt's apartment. A.S. did not identify Danforth in the courtroom, however. The state called former victims to testify about the sexual abuse underlying some of Danforth's previous convictions.

Danforth testified on his own behalf. He claimed that J.S.' parents trumped up the charges because J.S.' father was repulsed by Danforth's admitted homosexuality and J.S.' mother was angry with Danforth for various disparaging comments and criticism of her parenting skills. Danforth also claimed that he was reformed and understood the evil of his past ways.

The jury convicted Danforth of first-degree criminal sexual conduct. The district court denied Danforth's detailed motion for a new trial and sentenced him to an executed term of imprisonment of 216 months, and upward durational departure of 58 months, but less than double the presumptive sentence, which the state asserted was the minimum sentence required under Minn. Stat. § 609.1352 (the patterned sex offender statute).

State v. Danforth, 573 N.W.2d 369 (Minn. App. 1997), *rev. denied* (Minn. Feb. 19, 1998).

ARGUMENT

"The history of American freedom is, in no small measure, the history of procedure"

Justice Felix Frankfurter

Malinski v. New York
324 U.S. 401, 65 S. Ct. 781, 89 L.Ed. 1029 (1945)

The observation of Justice Frankfurter could have been written with the instant matter in mind. Decidedly, *Danforth v. Minnesota* presents a single issue of procedural law significant not only to the many convicted persons whose convictions, at least in part, rest upon the admission of "reliable hearsay," but as well to the judges and prosecutors of the fifty states, charged as they are with the duty of ensuring that due process remains, as it must, a protective umbrella over each and every criminal prosecution. The answer to the question of whether the rule enunciated in *Crawford v. Washington,* 541 U.S. 36 (2004) is to be afforded retroactive application promises an immediate and, depending upon that answer, immense impact upon criminal procedural law in the United States.

I. PETITIONER IS NOT ENTITLED TO RETROACTIVE APPLICATION OF THE *CRAWFORD* RULE; ACCORDINGLY, HIS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

While the various Circuit Courts of Appeal do not speak with unanimous voice as to the retroactive application of the *Crawford* rule, those that have commented upon the subject do agree that *Crawford* announces a new rule of constitutional criminal procedure. Because the announcement of a "new rule" is essential to the application of *Teague v. Lane*, 489 U.S. 288 (1989), any analysis of the question of retroactivity must begin with a determination of whether *Teague*, infact, applies.

A. *Crawford* Announced A New Rule.

Under *Beard v. Banks*, 542 U.S. 406, 413 (2004), a rule is new when it is not dictated by the law in effect at the time of the defendant's conviction. A poll of the Circuit Courts of Appeal reveals that they speak with unanimity in the belief that *Crawford* did, in fact, announce a new rule and that *Teague v. Lane* is applicable to the analysis of the question of *Crawford's* retroactive application.

As the Fifth Circuit observed in *Lave v. Dretke*, 444 F.3d 333 (5th Cir. 2006), "[b]ecause *Crawford* changed the test for the admissibility of certain out-of-court statements, it imposes new obligations on state and federal courts and qualifies as a new rule of criminal procedure."

That view was reiterated by the Seventh Circuit Court of Appeals in *Bintz v. Bertrand*, 403 F.3d 859 (7th Cir. 2005), a case of some significance to Minnesota as it arose in Minnesota's sister state, Wisconsin. *Bintz* concludes that

the U.S. Supreme Court announced a new rule for Confrontation Clause objections but that the rule has no retroactive application. In so doing, the Seventh Circuit stated:

> It seems clear that *Crawford* was a clean break from the line of precedent established by *Roberts*. *Crawford* considered and rejected the continuing application of *Roberts*. Nevertheless, a state court would not have acted unreasonably by failing to anticipate this ruling and applying *Roberts*. *Crawford* was thus a new rule for purposes of *Teague* (citations omitted).

Bintz v. Bertrand, 403 F.3d at 866.

Even the Ninth Circuit, being the sole proponent of *Crawford's* retroactive application among the Circuit Courts of Appeal, begins its analysis with the declaration that *Crawford* imposed a new rule, albeit not by the standard enunciated in *Teague*. Moreover, the rule announced in *Beard v. Banks* has not been met. As the Seventh Circuit Court of Appeals observed in *Murillo v. Frank*, 402 F.3d 786 (7th Cir. 2005), "*Crawford* was not 'dictated by *Roberts* *** it broke from it. That the break takes the form of a return to an older, less flexible but historically better grounded approach does not make it less a break."

Perhaps one of the better summaries of why *Crawford* establishes a new rule is found in *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. September 8, 2004).

> A decision of the Supreme Court announces a new rule if "the result was not dictated by precedent existing at the time defendant's conviction became final" (citations omitted). As we explained above, prior to the decision in *Crawford*, *Roberts* provided the appropriate framework for determining whether the admission of hearsay statements violated the Confrontation Clause. The Supreme Court itself noted that the logic of *Roberts* was inconsistent with the

> Court's conclusion in *Crawford* that the Confrontation Clause requires an opportunity to cross-examine before testimonial hearsay may be admitted against the defendant (citations omitted). Thus, *Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law.

Brown v. Uphoff, 381 F.3d at 1226

Interestingly, it is also clear that Chief Justice Rehnquist and Justice O'Connor believed that *Crawford* announced a new rule. In the concurrence/dissent of the Chief Justice, to which Justice O'Connor joined, it is stated:

> ...in making this appraisal, doubt that the new rule is indeed the "right" one should surely be weighed in the balance.
>
> * * *
>
> But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists ... is covered by the new rule.

Crawford, 124 S. Ct. at 1378

> Indeed, then, there can be little dispute that *Crawford*, by overruling the *Ohio v. Roberts*, 448 U.S.56, 65 L.Ed.2d 597, 100 S. Ct. 2531 (1980) manner of determining whether the admission of hearsay evidence violates the Sixth Amendment, created a new rule.

Often, there is more than one path through a forest, and the Minnesota Supreme Court, joined by the Seventh Circuit, elected the path less traveled to explain that *Crawford* announces a new rule.

The Minnesota Supreme Court observed:

> Danforth's argument is flawed because it misconstrues the test governing whether a rule is new for *Teague* purposes. We do not ask whether *Crawford's* rule is faithful to the original meaning of the Confrontation Clause or whether the results of relevant Supreme Court precedent are consistent with the rule in *Crawford*. Instead, we ask "whether 'reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* (emphasis in original) by existing precedent to rule in his favor'" (citations omitted). Put another way, Danforth's argument requires "reasonable jurists" to have foreseen *Crawford's* significant modification—if not outright overruling—of *Roberts*. When conducting an analysis under *Teague*, the Supreme Court has never required such prescience of lower courts. Furthermore, such a requirement would not "validate reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions" (citations omitted). Consequently, *Crawford* established a new rule of federal constitutional criminal procedure for the purposes of *Teague*.

Danforth v. State, 781 N.W.2d at 459.

The Seventh Circuit, following the same path, stated:

> It seems clear that *Crawford* was a clean break from the line of precedent established by *Roberts*. *Crawford* considered and rejected the continuing application of *Roberts*. Nevertheless, a state court would not have acted unreasonably by failing to anticipate this ruling and applying *Roberts*. *See O'Dell v. Netherland*, 521 U.S. 151, 156, 138 L.Ed.2d 351, 117 S. Ct. 1969 (1997). ("At bottom, the *Teague* doctrine 'validates reasonable good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" (citations omitted in original). *Crawford* was thus a new rule for purposes of *Teague*.

B. *Crawford's* Rule Is Procedural.

It is next necessary to examine whether *Crawford's* new rule is procedural, as opposed to substantive, law. This is because *Teague v. Lane* does not apply to substantive changes in the law, but, rather, to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard v. Banks,* 542 U.S. at 417 (quoting *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997)).

A rule imposes a substantive change when it "...alters the range of conduct or the class of persons that the law punishes," while a procedural rule is one which addresses "the manner of determining the defendant's culpability." *Schriro v. Summerlin,* 542 U.S. 348 at 353 (2004).

Decidedly, a rule requiring, as *Crawford* does with very limited exception, confrontation and cross-examination in lieu of reliable hearsay, addresses the way in which a defendant's culpability is to be proven in opposition to addressing the creation of a new crime or a new class of offenders. In fact, *Crawford* declares that the necessity of cross-examination is "a procedural rather than a substantive guarantee." *Crawford,* 541 U.S. at 61. Accordingly, *Crawford* announced a new rule of criminal procedural law. As such, *Teague* is applicable to the analysis of the retroactivity issue.

C. *Crawford's* New Rule Is Not A "Watershed Rule" And Does Not Require Retroactive Application.

1. The Rule of *Teague v. Lane.*

In *Teague v. Lane,* 489 U.S. 288, 301 (1989) this Court held:

> In general...a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government .... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Teague allows for retroactive application of a new law in only two instances: (1) where a new substantive law places certain kinds of primary, private individual conduct beyond the power of the criminal-making authority to proscribe, and (2) where a new procedural rule defines procedure implicit in the concept of ordered liberty. A new rule qualifies under the second exception if it is a "watershed" rule that implicates fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. at 307.

As Senior Judge Wallace explains in his *Bockting* concurrence/dissent, *Crawford's* new rule applies retroactively only if it falls within certain categories of rules. In *Schriro v. Summerlin*, 542 U.S. 348 (2004), this Court provided the following guidance:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, [citations omitted] as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish, [citations omitted]. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose on him. [citations omitted].
>
> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that

> someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect only to a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." [citations omitted].

Schriro v. Summerlin, 542 U.S. at 351-52.

Judge Wallace concludes, "Measured against *Summerlin's* standards, *Crawford* is best classified as a procedural rule." Wallace concurrence/dissent, *Bockting v. Bayer* at 2021.

2. *Crawford* Is Not A "Watershed" Rule.

The prototypical example of a watershed rule is *Gideon v. Wainwright,* 372 U.S. 335 (1963) which established an affirmative right to counsel in felony cases. It is against this standard that the Circuit Courts of Appeal have measured *Crawford,* and, with the single exception of the Ninth Circuit, have found it lacking. This is because a rule is classified as a "watershed" rule only if it meets two tests: The first is that "[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction." The second is that the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain,* 533 U.S. 656 (2001), (citing *Sawyer v. Smith,* 497 U.S. 227, 242 (1990), and *Mackey v. United States,* 401 U.S. 667, 693 (1971)).

a. *Crawford* Did Not Improve The Overall Accuracy Of The Criminal Process.

The *Crawford* court noted that while the goal of the Confrontation Clause was to improve reliability, it was a procedural guarantee.

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford v. Washington, 541 U.S. at 61-62.

In *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004), the Second Circuit Court of Appeals identified *Teague's* second exception as being "new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding and improve the accuracy of the criminal process." Applying that requirement to *Mungo*, the Second Circuit concluded:

> We do not believe that *Crawford* necessarily improves the overall accuracy of the criminal process. As we see the operation of the *Crawford* rule, it is likely to improve accuracy in some circumstances and diminish it in others. To the extent that *Crawford* requires the exclusion of unreliable hearsay that would have been admitted under the prior law, it is likely to improve accuracy. *** At the same time, however, *Crawford* also precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under the old rules. In such instances, juries will be deprived of highly reliable evidence of guilt, and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries. *** Where the testimony was admissible under the old rules precisely because it was

> reliable, these applications of *Crawford* will diminish, rather than increase, the accuracy of the process. *** Because *Teague's* test of a watershed rule requires improvement in the accuracy of the trial process overall, we conclude that *Crawford* is not a watershed rule. We thus conclude that *Crawford* should not be applied retroactively on collateral review.

Mungo v. Duncan, 393 F.3d at 336.

The Fifth Circuit, in *Lave v. Dretke,* 444 F.3d 333 (5th Cir. 2006), concisely concludes, "[t]he point of *Crawford* is not that only live testimony is reliable, but that the Sixth Amendment gives the accused a right to insist on live testimony, whether that demand promotes or frustrates accuracy." Quoting *Mungo,* the Court continued, "[b]ecause *Teague's* test of a watershed rule requires improvement in the accuracy of the trial process overall, we conclude that *Crawford* is not a watershed rule ... [and] should not be applied retroactively." *Mungo v. Duncan,* 393 F.3d at 336.

In *Murillo v. Frank*, 402 F.3d 786 (7th cir. 2005), another case arising from Minnesota's sister state, Wisconsin, the Seventh Circuit stated:

> Indeed, it would be a close question whether *Crawford* helps or hinders accurate decisionmaking. Live testimony is preferable to affidavits and transcribed confessions, because cross-examination can probe its weaknesses, but recorded testimony may be better than silence, when death or incapacity or threats or loyalty to one's confederates keep witnesses off the stand. The point of *Crawford* is not that only live testimony is reliable, but that the Sixth Amendment gives the accused a right to insist on live testimony, whether that demand promotes or frustrates accuracy. Like the self-incrimination clause and other provisions in the Bill of Rights, the confrontation clause can be invoked to prevent the conviction of persons who are guilty in fact. What *Crawford* holds is that defendants enjoy

> this right *even when the hearsay is trustworthy* (emphasis in original). This is not an indispensable innocence-protecting decision that must be applied retroactively to criminal prosecutions that have already been finally resolved on direct review.

Murillo v. Frank, 402 F.3d at 790-91.

The Seventh Circuit joined the debate in *Bintz v. Bertrand*, where that Court concluded:

> Further, it is unclear that *Crawford's* modification to the hearsay rules will markedly improve the accuracy of convictions. *Crawford* is not a guarantee of accuracy but an extension of the full constitutional protections of the Sixth Amendment. While the two concepts overlap, they are not synonymous. *Crawford,* therefore, is not a watershed change for purposes of the second *Teague* exception and does not apply retroactively.

Bintz v. Bertrand, 403 F.3d at 867.

In *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), the Ninth Circuit expressed the minority view that *Crawford* should be retroactively applied. The State of Minnesota, however, respectfully suggests that Judge Wallace, the Senior Judge of that Circuit, arrived at the correct result in his thoughtful concurrence/dissent:

> Nor am I prepared to assert that all testimonial hearsay evidence admitted without the opportunity for cross-examination necessarily renders a criminal trial "impermissibly inaccurate" (citation omitted), or otherwise "unfair."

Bockting v. Bayer, 399 F.3d at 1027.

The foregoing reasoning is sound. Moreover, this Court, in articulating its foundation for the *Crawford* decision, did not suggest that evidence introduced under *Roberts* was of diminished accuracy, but, rather, that:

> ...the Framers would not have allowed admission of testimonial statements of a witness who did not appear at the trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.

Crawford v. Washington, 541 U.S. 36 at 53-54.

Similarly, although this Court criticized *Roberts'* unpredictability (541 U.S. at 63), that criticism was unaccompanied by the conclusion that the application of *Roberts* necessarily resulted in diminished accuracy.

Thus, the syllogism giving rise to the conclusion that *Crawford* is not retroactive becomes apparent: (a) If the law requires that for a watershed rule to exist, infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and (b) if application of the rule of *Roberts* did not diminish that likelihood and *Crawford* did not enhance it, then (c) *Crawford* simply cannot be a watershed rule.

A second syllogism then, becomes immediately applicable: (a) If Petitioner Danforth's request for retroactive application of the *Crawford* rule requires a finding that *Crawford* is a watershed rule, and (b) *Crawford* is not a watershed rule, then (c) Petitioner Danforth's prayer for retroactive application of *Crawford* must fail.

D. Because Confrontation Clause Violations Are Subject To Harmless Error Analysis, *Crawford* Is Not A Watershed Rule Entitled To Retroactive Application.

In *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004), it is observed that although this Court "referred to the protections of the Confrontation Clause as a 'bedrock procedural guarantee,'" *Crawford*, 124 S. Ct. at 1359, such reference "does not necessarily suggest that the rule set forth in *Crawford* is 'on the magnitude of the rule announced in *Gideon v. Wainwright* as it must be to fit within the *Teague* exception.'" *Brown*, 381 F.3d at 1226. The Tenth Circuit continued, stating that because "Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial," (citation omitted) "[i]t would ... be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process." *Brown*, 381 F.3d at 1226-27. Relying in part upon that analysis, the 10th Circuit concluded that *Crawford* was not a watershed decision and, therefore, was not retroactively applicable.

Because Confrontation Clause violations are subject to harmless error review (*see Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988)), *Crawford* does not enjoy the primacy and centrality of the *Gideon* rule. Indeed, the fact that *Crawford* errors are subject to harmless error review is a primary and central reason why *Crawford* should not be retroactively applied.

It is absolutely inconceivable that any appellate tribunal, even when presented with overwhelming, non-hearsay evidence of guilt, would sustain a conviction obtained in violation of a criminal defendant's right to counsel as

guaranteed by *Gideon v. Wainwright*. However, it is nonetheless true that if confronted with the same quantum of non-hearsay evidence, the same tribunal, exercising the harmless error rule, could legitimately sustain a conviction over the objection that hearsay evidence had erroneously been allowed.

In *Brown v. Uphoff*, the Tenth Circuit similarly took note of the effect of the harmless error rule:

> Unlike *Gideon*, *Crawford* does not "alter [] our understanding of what constitutes basic due process," *Mora*, 293 F.3d at 1219, but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. *Crespin v. New Mexico*, 144 F.3d 641, 649 (1988). It would, therefore, be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process. *See Mora*, 293 F.3d at 1219 (holding that *Apprendi v. New Jersey* did not alter fundamental due process rights, in part because *Apprendi* errors could be excused given overwhelming evidence). Accordingly, we conclude that *Crawford* is not a watershed decision and is, therefore, not retroactively applicable to Brown's initial habeas petition.

Brown v. Uphoff, 381 F.3d at 1226-27.

CONCLUSION

Chief Justice Rehnquist, joined by Justice O'Connor in a concurrence/dissent to *Crawford*, adhere to the view that *Crawford* has only prospective application.

> Though there are no vested interests involved, unresolved questions for the future of everyday criminal trials throughout the country surely counsel the same sort of caution. The Court grandly declares that "[w]e leave for another day any effort to spell out a comprehensive definition of "testimonial." But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists ... is covered by the new rule. They need them now, not months or years from now.

Id. at 1378.

While it is clear that the Chief Justice and Justice O'Connor were greatly concerned as to the prospective impact of the *Crawford* decision as it pertained to the definition of "testimony" it is interesting to note that nowhere in their concurrence/dissent is there to be found any mention of the impact that retroactive application of the *Crawford* rule would visit upon courts and prosecutors throughout the fifty states. It is tempting to suggest that the negative implication of that omission is that neither Justice, even in their most innovative imaginings, conceived of a day when *Crawford* would be a retroactive recourse available to anyone whose conviction rested, at least in part, upon testimonial hearsay. Fortunately, we need not rest upon such speculation. The examination of retroactive application of the *Crawford* rule undertaken by the several Circuit

Courts of Appeal provides suitable discussion. All that remains is for this Court, as it must, to agree.

Accordingly, the State of Minnesota requests that this Court deny Mr. Danforth's Petition for Writ of Certiorari. In the alternative, the State of Minnesota joins Petitioner in the suggestion that the writ be granted but the matter be stayed, pending resolution of *Whorton v. Bockting*, ___ U.S. ___, 126 S. Ct. 2017 (2006) (U.S. Supreme Court File # 05-595), which presents exactly the same issue.

DATED: February 9, 2007

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74 (5) 4-18-2007

NO. 06-8273

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN DANFORTH,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA

SUPPLEMENTAL RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In *State v. Danforth*, 718 N.W.2d 451 (Minn. 2006), the Minnesota Supreme Court held that the new rule announced in *Crawford v. Washington*, 541 U.S. 296 (2004) could not be retroactively applied in a state collateral attack of a final conviction. *Danforth*, 718 N.W.2d at 461. The Minnesota Supreme Court observed that it was "compelled" to apply the federal retroactivity standard in *Teague v. Lane*, 489 U.S. 288 (1989) to resolve the retroactivity question. *Danforth*, 718 N.W.2d at 455-56.

Petitioner Stephen Danforth filed a Petition for a Writ of Certiorari challenging the judgment of the Minnesota Supreme Court. After the petition was filed, this Court ruled that, under *Teague*, the new confrontation rule announced *Crawford* could not be applied retroactively on collateral review. *Whorton v. Bockting*, ___U.S.___, 127 S. Ct. 1173, 1183-84 (2007).

By letter dated March 20, 2007, Respondent has been asked to file a supplemental response to the following question:

> Are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989) to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?

REASONS FOR DENYING THE PETITION.

1. The Minnesota Supreme Court's resolution of the retroactivity question was consistent with this Court's precedents.

The Minnesota Supreme Court's resolution of the retroactivity question was consistent with this Court's precedents and should not be reviewed. The court correctly held that, when asked to determine the retroactive application of a new federal rule on collateral review, it must follow the principles of *Teague*.

This Court has repeatedly held that the retroactivity of a new federal rule is a federal question and is governed by federal law.

> The determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applied to conduct or events that occurred before the date of the decision—is a matter of federal law. When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. The retroactive applicability of a constitutional decision of this Court, however, is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions.

American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 177 (1990) (citations and quotations omitted).

> The Supremacy Clause, U.S. Const., Art. VI, cl. 2 does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law ... cannot extend to their interpretations of federal law.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 100 (1993); *see also Michigan v. Payne*, 412 U.S. 47, (1973) (reversing state court determination that new federal constitutional rule applied retroactively to a final conviction).

Teague is the federal standard for determining the retroactivity of a new federal constitutional rule on collateral review. Under *American Trucking*, *Harper*, and *Payne*, state courts must "adhere" to the *Teague* framework when determining whether a defendant is "entitled to have a new rule of federal constitutional criminal procedure applied retroactively to his or her case" on collateral review. *Danforth*, 718 N.W.2d at 456.

Petitioner's position is not only contrary to *American Trucking*, *Harper*, and *Payne* but is also inconsistent with this Court's interest in federal uniformity and accepted principles of judicial federalism. This Court has long recognized "the necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816). "The goal of national uniformity rests on a fundamental principle: that a single sovereign's law should be applied equally to all." Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 4 (1985). Contrary to Petitioner's assertion, *Teague* is not limited to federal habeas cases. *Teague* was driven not just by concerns for comity and finality but also by this Court's desire that federal law be applied uniformly to similarly-situated defendants. As the *Teague* plurality observed, "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of 'administration of justice with an even hand.'" *Teague*, 489 U.S. at 315 (quotation omitted). The goal of uniformity is defeated if defendants in states granting retroactivity can use a new federal rule to attack their convictions on collateral review while defendants in states that follow *Teague* (and federal defendants) do not enjoy this potential benefit. Defendants in "retroactive" states would be treated differently *with regard to federal law* than similarly-situated defendants in "non-retroactive" states. The need for federal uniformity does not turn on form. It is just as compelling in a state collateral attack as it is a federal habeas proceeding.[1]

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[1] In the past, this Court has applied federal retroactivity principles to federal issues raised in state collateral proceedings. *See, e.g., Johnson v. New Jersey*, 384 U.S. 719 (1966) (holding defendant was not entitled to retroactive application of *Miranda* rule in a collateral state court proceeding).

This Court is the ultimate authority on the meaning and application of federal constitutional law. *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). In our federal system, the Supremacy Clause commands that this Court's precedents bind state courts on issues of federal law. *Sims v. Georgia*, 385 U.S. 538, 544 (1967); *see also Claflin v. Houseman*, 93 U.S. 130, 135-37 (1876) ("The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are."). At the same time, federal courts are bound by state court interpretations on questions of state law. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *Felder v. Casey*, 487 U.S. 131, 151 (1988).

Under our federal system, a state "is free as a matter of its own law" to afford broader protections to its citizens "than those this Court holds to be necessary upon federal constitutional standards." *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *see also Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) ("States are entirely free to *effectuate under their own law stricter standards* than those we have laid down and to *apply those standards* in a broader range of cases that is required by" federal law) (emphasis added). A state court cannot, however, grant broader federal constitutional rights to a defendant under state law. *Hass*, 420 U.S. at 719; *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001).

Hass and *Sullivan* stand for the proposition that a state cannot use state law to expand the scope of a federal constitutional decision. This is precisely what Petitioner advocates. He seeks to use state law to enlarge the retroactive application of the new federal constitutional rule announced in *Crawford*.

Accepting Petitioner's argument would put federal courts in an untenable position. Consider this example: a state court chooses to apply *Crawford* retroactively in a state collateral proceeding to a final conviction. It determines that a particular statement is non-testimonial and, therefore, no confrontation violation has occurred. The defendant files a

petition for a writ of habeas corpus in federal district court or seeks direct review from this Court. The federal court has two alternatives. It can ignore *Teague* and review the state court's ruling. Or, the federal court can follow *Teague* and leave the state court judgment unreviewed. *See Horn v. Banks*, 536 U.S. 266, 271 (2002) (federal habeas court must apply *Teague* bar when asserted even if state court already applied new federal rule without considering retroactivity). The first alternative is problematic because it grants state courts power to attach conditions (*i.e.* abandonment of controlling federal law) on the exercise of necessary federal judicial power. *See Pennsylvania v. Williams*, 294 U.S. 176, 182 (1935) (jurisdiction of federal court not subject to diminution or control by state law). The second alternative is equally problematic because it renders the state court the final arbiter on a federal constitutional issue. *National Tea Co.*, 309 U.S. at 557 (holding it is this Court's responsibility to assure "that state courts will not be the final arbiters of important issues under the federal constitution.").

Requiring state courts to apply *Teague* to assess the retroactivity of newly announced federal rules on state collateral review comports with accepted principles of federalism. What federalism represents "is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). While state courts must follow federal retroactivity standards on questions of federal law, states have complete freedom to grant broader retroactive application to rulings based on state law. If a state court finds a federal constitutional rule particularly compelling, it is free to adopt the ruling as a matter of state law and to apply the state decision retroactively without federal interference. *See Wainwright v.*

Stone, 414 U.S. 21, 23 (1973) (states can choose the degree of retroactivity they wish to accord new decisions based on state law); *Aikens v. California*, 406 U.S. 813, 814 (1972) (the retroactivity of a new state-based rule is not reviewable by federal courts).

Petitioner did not ask the Minnesota Supreme Court to adopt *Crawford* as a matter of state constitutional law. Had he done so, he could have asked the court to disregard *Teague* and fashion a broader or more favorable state retroactivity rule. Petitioner sought the retroactive benefit of a newly announced federal constitutional rule. The Minnesota Supreme Court was not free to apply *Crawford*'s federal holding to a broader range of cases than *Teague* and *Bockting* allow. The Minnesota Supreme Court properly followed this Court's precedents and its decision should not be reviewed or disturbed. Certiorari review would be more appropriate to correct a state court's misapplication of *American Trucking*, *Harper*, and *Payne*.

2. The split in authorities on the retroactivity question is not compelling. The vast majority of state courts follow *Teague* when deciding whether a new federal constitutional rule is retroactive on collateral review.

Petitioner claims that it is necessary for this Court to resolve the issue of whether state courts must use *Teague* to determine the retroactive application of new federal rules because there is a "large and intractable" split in state authorities on this issue. The conflict among state authorities is not as profound or dire as Petitioner contends.

While courts differ on the necessity of applying *Teague*, the vast majority of states have applied *Teague* in determining the retroactivity of a new federal constitutional decision on collateral review. *See Duncan v. State*, 925 So.2d 245 (Ala. Crim. App. 2005); *State v. Towery*, 64 P.3d 828 (Ariz. 2003); *In re Moore*, 34 Cal. Rptr.3d 605 (Cal. Ct. App. 2005); *Edwards v. People*, 129 P.3d 977 (Colo. 2006); *Duperry v. Solnit*, 803 A.2d 287 (Conn. 2002); *Bailey v. State*, 588 A.2d 1121 (Del. 1991); *Harris v. State*, 543 S.E.2d 716 (Ga.

2001); *State v. Gomes*, 113 P.3d 184 (Hawaii 2005); *Hoffman v. Arave*, 121 P.3d 958 (Id. 2005); *People v. Flowers*, 561 N.E.2d 674 (Ill. 1990); *Brewer v. State*, 444 N.W.2d 77 (Iowa 1989); *Drach v. Bruce*, 136 P.3d 390 (Kan. 2006); *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005); *Casella v. State*, 802 A.2d 404 (Me. 2002); *State v. Adams*, 912 A.2d 16 (Md. App. 2006); *Commonwealth v. Bray*, 553 N.E.2d 538 (Mass. 1990); *People v. Sexton*, 580 N.W.2d 404 (Mich. 1998); *Danforth*, 718 N.W.2d 451 (Minn. 2006); *Manning v. State*, 929 So.2d 885 (Miss. 2006); *State v. Egelhoff*, 900 P.2d 260 (Mont. 1995); *State v. Lotter*, 664 N.W.2d 892 (Neb. 2003); *State v. Tallard*, 816 A.2d 977 (N.H. 2003); *State v. Lark*, 567 A.2d 197 (N.J. 1989); *People v. Eastman*, 648 N.E.2d 459 (N.Y. App. 1995); *Burr v. Kulas*, 532 N.W.2d 388 (N.D. 1995); *Pickens v. State*, 74 P.3d 601 (Ok. Cr. App. 2003); *Page v. Palmateer*, 84 P.3d 133 (Or. 2004); *Commonwealth v. Hughes*, 865 A.2d 761 (Pa. 2004); *Pailin v. Vose*, 603 A.2d 738 (R.I. 1992); *Talley v. State*, 640 S.E.2d 878 (S.C. 2007); *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001); *Taylor v. State*, 10 S.W.3d 673 (Tex. Cr. App. 2000); *Mueller v. Murray*, 478 S.E.2d 542 (Va. 1996); *State v. Blake*, 478 S.E.2d 550 (W.Va. 1996); *State v. Lagundoye*, 674 N.W.2d 526 (Wis. 2004); *Hanesworth v. State*, 783 P.2d 173 (Wyo. 1989). Even among jurisdictions that do not believe they are "bound" by *Teague*, many courts have voluntarily adopted the federal standard. *See State v. Mohler*, 694 N.E.2d 1129 (Ind. 1998); *Taylor v. Whitley*, 606 So.2d 1292 (La. 1992); *Colwell v. State*, 59 P.3d 463 (Nev. 2002); *State v. Zuniga*, 444 S.E.2d 443 (N.C. 1994); *State v. Evans*, 114 P.3d 627 (Wash. 2005). Only a few jurisdictions have rejected *Teague* in favor of a state-based retroactivity standard. *See State v. Smart*, 146 P.3d 15 (Alaska App. 2006) *rev. granted* (Feb. 2007); *Johnson v. State*, 904 So.2d 400 (Fla. 2005); *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); *State v. Forbes*, 119 P.3d 144 (N.M. 2005); *Cowell v. Leapley*, 458 N.W.2d 514 (S.D. 1990). Some of these decisions appear to have limited application or impact. *See Forbes*,

119 P.3d at 147 (limiting its ruling to the "unique facts and procedural posture" of the case); *Whitfield*, 107 S.W.3d at 269 (noting that its decision would impact "only five" potential cases on collateral review).

A split in authority is not necessarily a compelling reason to justify the grant of Supreme Court review on an issue. *See, e.g., Metheny v. Hamby*, 488 U.S. 913 (1988). Exercise of this Court's discretionary jurisdiction would be more appropriate to resolve a federal question with broader impact among the state courts.

3. A decision from this Court will not alter the result reached by the Minnesota Supreme Court in Petitioner's case.

Even if the Court were to conclude that state courts are not bound by *Teague* in determining the retroactivity of a new federal rule on collateral review, Petitioner would not be entitled to relief under Minnesota law. Minnesota courts have applied varying rules of retroactivity to new state law rulings on *direct* review. *See State v. Baird*, 654 N.W.2d 105 (Minn. 2002); *Baker v. State*, 590 N.W.2d 636 (Minn. 1999). Minnesota has followed *Teague*, however, in determining whether new state law rulings should be applied retroactively on *collateral* review. *See Stiles v. State*, 716 N.W.2d 327 (Minn. 2006) (holding new state rule on necessity of instructing jury on lesser-included offense not retroactive on state collateral review under *Teague*); *Erickson v. State*, 702 N.W.2d 892 (Minn. App. 2005) (holding new state rule on necessity of probation revocation findings not retroactive on state collateral review under *Teague)*. In other words, *Teague* has been used as Minnesota's retroactivity standard for cases on collateral review. A decision by this court will not change the result reached by the Minnesota Supreme Court or afford Petitioner any relief. As such, review of the Minnesota Supreme Court's decision is unwarranted.

CONCLUSION

For the foregoing reasons, Respondent, State of Minnesota, respectfully requests this Court to deny the Petition for a Writ of Certiorari.

DATED: April 18, 2007

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April 26, 2007

No. 06-8273

In the
SUPREME COURT OF THE UNITED STATES

Stephen Danforth, *Petitioner,*

v.

State of Minnesota, *Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Danforth respectfully submits the following supplemental reply brief in support of the petition for writ of certiorari.

Respondent State of Minnesota proposes that the following is true: the courts of the sovereign state of Minnesota may not, under any circumstances, apply the holding of *Crawford v. Washington*, 541 U.S. 296 (2004), to any case that was "final" before *Crawford* was decided because the Federal District Court for the District of Minnesota could not grant such defendants relief under *Crawford* via a federal habeas corpus petition.[1] In other words, respondent agrees with the Minnesota Supreme Court's holding that once the federal habeas corpus avenue of relief has closed, the sovereign states are powerless to allow collateral attacks upon criminal convictions based upon new rules of federal constitutional law. Because this Court's precedents do not compel any such radical conclusion, because of the split of lower-court authority on the issue, and because of the importance thereof, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

1. This Court has not decided whether states are forced, via the Supremacy Clause or any other mechanism, to use the retroactivity standard announced in *Teague*.

Respondent begins it supplemental brief in opposition (S-BIO) by claiming that,

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[1] *See Wharton v. Bockting*, 127 S.Ct. 1173, 1183-84 (2007) (holding that *Crawford* does not apply to cases pending on federal habeas corpus review). In light of *Bockting*, petitioner withdraws the second question presented in the original petition for writ of habeas corpus.

essentially, this Court has answered the question presented and has already held that state courts must apply the *Teague*[2] standard, and the *Teague* standard only, to determine the retroactive effect of a United States Supreme Court decision. (S-BIO at 2-6). Respondent is wrong.

There is a wide split of lower-court authority on this question. The majority of state courts which had considered this issue have squarely held that "*Teague* does not govern a state court's decision to grant retroactive application of a new [federal] constitutional rule in state post-conviction proceedings – that, instead, *Teague* binds only federal courts in federal habeas corpus proceedings." *Smart v. State*, 146 P.3d 15, 25 (Alaska Ct. App. 2006); (citing *People v. Bradbury*, 68 P.3d 494, 498 (Colo. App. 2002); *Johnson v. State*, 904 So.2d 400, 408-09 (Fla. 2005); *Figarola v. State*, 841 So.2d 576, 577 n. 1 (Fla. App. 2003); *People v. Flowers*, 561 N.E.2d 674, 682 (Ill. 1990); *State v. Mohler*, 694 N.E.2d 1129, 1132 (Ind.1998); *Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1989); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296 (La. 1992); *State v. Whitfield*, 107 S.W.3d 253, 267 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 470-71 & n. 41 (Nv. 2002); *State v. Lark*, 567 A.2d 197, 203 (N.J. 1989); *State v. Evans*, 114 P.3d 627, 633 (Wash. 2005) (parenthetical descriptions of holdings and quotes omitted)). A minority of states, including Minnesota in the case at bar, have disagreed. *See Danforth v. State*, 718 N.W.2d 451, 455 (Minn. 2006); *State v. Egelhoff*, 900 P.2d 260, 267 (Mont.

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[2] *Teague v. Lane*, 489 U.S. 288 (1989).

1995); *Page v. Palmateer*, 84 P.3d 133, 136-38 (Or. 2004).[3]

If the question presented was as settled as respondent claims it to be, it is hard to imagine that courts in so many states would have gotten the law so wrong. The fact that reasonable jurists in no fewer than 15 states have reached opposite conclusions on a question of federal law[4] is reason enough for this Court to grant the petition for writ of certiorari in this case.

Respondent relies heavily upon three cases – *American Trucking Ass'n v. Smith*, *Michigan v. Payne*, and *Harper v. Virginia Dept. of Taxation* – to support its claim that the Minnesota Supreme Court's decision was correct. (S-BIO at 2). None of those cases even touch upon, let alone answer, the question presented here.

In *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990), this Court considered

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[3] Still others have simply "assumed, apparently without examining the issue, that *Teague* controls state litigation as well as federal habeas corpus litigation." *Smart*, 146 P.3d at 25 (citing *Johnson v. Warden*, 591 A.2d 407, 410 (Conn. 1991); *Whisler v. State*, 36 P.3d 290, 296 (Kan. 2001); *People v. Eastman*, 85 N.Y.2d 265, 624 N.Y.S.2d 83, 88-89, 648 N.E.2d 459, 464-65 (1995); *Agee v. Russell*, 751 N.E.2d 1043, 1046-47 (Oh. 2001); *Thomas v. State*, 888 P.2d 522, 527 (Okla. Crim. App.1994); *Commonwealth v. Hughes*, 865 A.2d 761, 780 (Pa. 2004); *State v. Gómez*, 163 S.W.3d 632, 650-51 (Tenn. 2005), *vacated on other grounds by* 127 S.Ct. 1209 (U.S. Feb. 20, 2007); *Taylor v. State*, 10 S.W.3d 673, 679 (Tex. Crim. App. 2000)).

[4] The question presented – whether state courts are permitted to apply this Court's decisions to a broader class of defendants than those eligible in federal habeas corpus proceedings – is undeniably one of federal law. *See American Trucking Ass'n v. Smith*, 496 U.S. 167, 177 (1990) (quoting *Chapman v. California*, 386 U.S. 18, 21 (1967)). *See also Id.* at 211 n. 4. Respondent chides petitioner for not asking the Minnesota Supreme Court to "adopt" *Crawford* as a matter of state law and then seek retroactive application of that state-law rule. (S-BIO at 6). Had petitioner done as much, the case would present only a question of state law. This case presents an issue of federal law that is one of first impression. This Court should grant the petition to answer it.

whether the Arkansas Supreme Court had erroneously applied Supreme Court precedents on the retroactive application of civil decisions. *American Trucking*, 496 U.S. at 178. The Court held that federal law on the retroactive effect of civil decisions controlled and that the lower courts had erred in interpreting that law. *Id.* at 200. The Court reversed and remanded for further proceedings. *Id.* But the Court made clear that Arkansas, and other states similarly affected, were not prevented from providing civil litigants more protections than the federal courts offered. *See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Relations of Fla.*, 496 U.S. 18, 52 n. 36 (1990) (holding that "[t]he State is free, of course, to provide broader relief as a matter of state law than is required by the federal constitution"); *American Trucking*, 496 U.S. at 200 (remanding for state court to afford relief "not inconsistent with" *McKesson*). *See also American Trucking*, 496 U.S. at 178-79 (describing *McKesson* as holding that "federal law sets certain minimum requirements that States must meet but may exceed in provided appropriate relief") (emphasis added); *Id.* at 210-11 (Stevens, J., dissenting) (contending that federal constitutional "does not ordinarily limit the State's power to give a decision remedial effect greater than that which a federal court would provide") (citations omitted).

As the Alaska Court of Appeals explained:

> * * * *American Trucking* merely says that, under the supremacy clause, state courts must follow any rule of retroactivity imposed on them by the Supreme Court. The underlying question that remains to be addressed – the question that *American Trucking* does not answer – is whether the Supreme Court intended the *Teague* retroactivity test to be binding on the states.

Smart, 146 P.3d at 23. Furthermore, *American Trucking* does not answer the question presented here because it does not involve a state court's attempt to grant to a criminal defendant broader rights than the federal constitution or the federal courts would authorize.

Michigan v. Payne, 412 U.S. 47 (1973), is even less apposite. In *Payne*, the Michigan Supreme Court afforded sentencing relief to a defendant by applying retroactively this Court's decision in *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969). *Payne*, 412 U.S. at 48-49. The Michigan court, however, expressly tied its decision to further action by this Court, writing that it was only applying *Pearce* "pending clarification" of the retroactive effect of *Pearce* by this Court. *Payne*, 412 U.S. at 49 (citation omitted). This Court granted certiorari and held that, as a matter of federal law, *Pearce* did not apply retroactively. *Id.* The Michigan Supreme Court did not hold that it could not afford Payne any relief if *Pearce* did not apply retroactively under federal law; it simply held that it would not do so. *Payne*, 412 U.S. at 49.

That is the difference between *Payne* and the instant case. Here, the Minnesota Supreme Court stated unequivocally that it was prohibited from applying any test other than *Teague* to petitioner's claim; if petitioner was not entitled to relief under *Teague*, the Minnesota court held, than he could not be entitled to relief under state law either. *Danforth*, 718 N.W.2d at 456-57. The question presented here is whether the Minnesota Supreme Court was correct and *Payne* does not address, much less answer, that question.

Finally, *Harper* stands for the unremarkable proposition that states must grant at least as much protections to their citizens as those citizens would receive in federal court.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993). *Harper* is essentially the *Griffith v. Kentucky*, 479 U.S. 314 (1987), of civil litigation; in it, this Court held that "when [the Court] applies a [new] rule of federal law to the parties before it, that rule * * * must be given full retroactive effect in all cases still open on direct review." *Harper*, 509 U.S. at 97. But *Harper* does not touch upon, let alone decide, the states' authority to grant more protection to an individual litigant than that litigant would be afforded in federal court. The question here is not whether Minnesota must afford petitioner all of the protections affordable to him under federal law, the question is whether Minnesota is permitted to afford petitioner greater protections than those available in federal court. Like *Payne* and *American Trucking*, *Harper* does not touch upon that question.

This Court has not answered the question presented in this case. It should grant the petition for writ of certiorari to do so.

2. Respondent is wrong on the merits – *Teague* does not apply to or bind the state courts.

Turning to the merits, respondent claims, without citation, that "*Teague* is not limited to federal habeas cases." (S-BIO at 3). Respondent is wrong. The purpose of the *Teague* standard was to limit federal courts' ability to review a state criminal conviction on federal habeas review.

> Habeas corpus always has been a collateral remedy [that] provid[es] an avenue for [overturning] judgments that have become otherwise final. It is not designed as a substitute for direct review [of a criminal conviction]. [Because of this, the] interest in leaving [the underlying] litigation in a state of repose, ... not subject to further judicial revision, may quite legitimately be found ... to outweigh[,] in ... most instances[,] the competing interest in readjudicating [criminal] convictions according to all [of the] legal standards in effect when a habeas petition is filed.

> [Rather,] it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time [the defendant's] conviction became final....

Teague, 489 U.S. at 305-06 (quoting *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part)). According to the *Teague* plurality, habeas corpus was not intended "to assure that an individual accused of a crime is afforded a trial free of constitutional error." *Id.* at 308. Rather, "interests of [federal-state] comity and finality [of criminal judgments] must also be considered in determining the proper scope of habeas review." *Id.* Finally, in emphasizing the important comity and context principles at play in *Teague*, the Court concluded that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Id.* at 310 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n. 33 (1982)).[5]

None of these comity concerns apply to state courts reviewing state-court criminal convictions, nor is there any indication that this Court intended to indicate that they did. Put simply, "*Teague* does not address the authority of state courts; rather, *Teague* restricts the authority of federal courts to overturn state criminal convictions." *Smart*, 146 P.2d at 23. As the South Dakota Supreme Court stated:

> The *Teague* decision ... arose in the context of interpreting federal habeas corpus law, a right granted through federal statutes.... The various states, including South Dakota, have created state rights of habeas corpus through statutes.... Each sovereign has the right to decide how it will allow access to this extraordinary remedy. The federal government controls how it permits access to the remedy in its courts, and South Dakota establishes grounds that will provide access to habeas corpus in our courts.

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[5] *See Smart*, 146 P.3d at 21-22, for a detailed discussion of the purposes of *Teague*.

Cowell v. Leapley, 458 N.W.2d 514, 517 (S.D. 1990) (emphasis added); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (noting that *Teague* was "grounded in important considerations of federal-state relations").

Just as the Minnesota state courts would have no business instructing the federal courts on how to interpret the federal habeas corpus statute, the federal courts have no business dictating to the Minnesota state courts how it should interpret and apply Minnesota's Post-Conviction Relief Act, Minn. Stat. § 590.01, *et seq.* (2004). Under that law, any person who claims that his conviction was obtained in a manner that "violated the person's rights under the Constitution or laws of the United States or of the state [of Minnesota]" may petition the district court for relief. Minn. Stat. § 590.01, subd. 1 (2004). When considering such a petition, the statute affords the district court broad remedial powers; it may "vacate and set aside the judgment and discharge the petitioner or...resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate." *Id.*

If the Minnesota Supreme Court chooses to limit the state district courts' otherwise broad authority to hear constitutional claims by imposing upon them the *Teague* standard, the Minnesota court may do so. The question presented here, however, is whether this Court has already imposed that limit upon the states and whether this court, or any federal court, could do so. *See Evans*, 114 P.3d at 449 ("Limiting a state statute on the basis of the federal court's caution [expressed in *Teague*] in interfering with State's self-governance would be, at least, peculiar."). The Court should grant the petition to answer this question.

Respondent argues that concerns about "uniformity" support the proposition that state courts must apply *Teague*. (S-BIO at 5-6). But such concerns have never animated this Court's discussions of state courts' authority to grant greater protections than those afforded by the federal constitution. Consider, as just one example, the question of whether a Sixth Amendment error under *Blakely v. Washington*, 542 U.S. 246 (2004), is automatically reversible structural error. In 2005, the Washington state supreme court held that it was. *State v. Hughes*, 110 P.3d 192 (Wash. 2005). This Court granted certiorari and reversed, holding that *Blakely* errors were not structural under *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). *Washington v. Recuenco*, 126 S.Ct. 2546, 2553 (2006). The Court make clear, however, that Recuenco's "argument that, as a matter of state law, the *Blakely* * * * error was not harmless remains open to him on remand." *Recuenco*, 126 S.Ct. at 2551 n. 1 (emphasis original); *see also Id.* at 2554 (Stevens, J., dissenting) (agreeing with majority that "[t]he Washington Supreme Court can, of course, reinstate the same judgment on remand * * * [if] that court chooses, as a matter of state law, to adhere to its view that the proper remedy for *Blakely* errors * * * is automatic reversal of the unconstitutional portion of a defendant's sentence").

This Court gave the state of Washington permission to hold that criminal defendants in that state are entitled to something that criminal defendants in other states, let alone in federal court, are not entitled to – automatic reversal of the portion of their sentences that were imposed in violation of the federal constitution. If respondent's concerns about "uniformity" had any merit in this context, Washington state would not be free to hold that *Blakely* errors are structural in that state, and in that state only.

Respondent also cites *Horn v. Banks*, 536 U.S. 266, 271 (2002), in support of its position that *Teague* binds state courts. (S-BIO at 5). *Banks* holds nothing of the kind. In *Banks*, the Pennsylvania Supreme Court declined to engage in a *Teague* analysis and ruled on the merits of Banks' federal constitutional claim, raised in a post-conviction petition. *Commonwealth v. Banks*, 656 A.2d 467, 470 (Pa. 1995). Banks then filed a federal habeas petition and the Third Circuit held that it did not have to apply *Teague* because the state court had reached the merits of the issue. *Banks v. Horn*, 271 F.3d 527, 541-43 (3rd Cir. 2001). This Court reversed and held that federal courts must apply *Teague* where the state asserts it as a defense, even where the state courts reach the merits of a particular issue. *Banks*, 536 U.S. at 272. But the Court did not suggest that the Pennsylvania Supreme Court had erred by not applying *Teague*. *See Smart*, 146 P.3d at 25. If state courts were required to apply *Teague*, as the Minnesota Supreme Court held in this case, then the Pennsylvania Supreme Court would have erred by not doing so. Nothing in *Banks* suggests that this is true.

Finally, petitioner is not asking the Court to, in respondent's words, "grant broader federal constitutional rights to a defendant under state law." (S-BIO at 4) (citing *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001); *Oregon v. Hass*, 420 U.S. 714, 719 (1975)). In *Hass* and *Sullivan*, the state courts misapplied substantive provisions of the federal constitution and this Court, of course, is the final arbiter of such disputes. But nothing in those cases decides the issue present here – whether the state supreme court erred by concluding that it could not grant petitioner more protections than he would be afforded in federal court. *See Recuenco*, 126 S.Ct. at 2551 n. 1; *Brigham City, Utah v.*

Stuart, 126 S.Ct. 1943, 1950-51 (2006) (Stevens, J., concurring) (noting that where state courts misapply substantive portions of federal constitution, state may reach the same result by exercising its authority to grant broader protections to its citizens).

3. A decision from this Court may well afford petitioner the relief he seeks.

Respondent claims that, even if it felt that it had a choice in the matter, the Minnesota Supreme Court would still use the *Teague* standard. (S-BIO at 8). This proposition finds no support in the Minnesota Supreme Court's decision in this case. If the Minnesota court felt the way respondent believes it does, it would have been simple enough for the court to say so. *Cf. People v. Flowers*, 561 N.E.2d 674, 682 (Ill. 1990) (Illinois Supreme Court holds that *Teague* only applies to federal habeas corpus litigation but adopts *Teague* as a matter of state law); *Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1989) (same). But the Minnesota court said nothing of the kind. To the contrary, the court made clear that it felt it had no choice in the matter. *Danforth*, 718 N.W.2d at 456-57. The Minnesota Supreme Court has several times exercised its authority to grant greater protections to criminal defendants in Minnesota than such defendants would be afforded in federal court. *See, e.g., State v. Askerooth*, 681 N.W.2d 353, 359-63 (Minn. 2004) (declining to adopt holding of *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001)); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 780-83 (Minn. 1993) (declining to adopt holding of *California v. Hodari D.*, 499 U.S. 621 (1991)). While this history is by no means a prediction of what the Minnesota court would do if freed of its understanding that it had to use *Teague*, it is indicative of a court that seriously considers granting

broader protections to its citizens. Respondent's conclusory claim, that the Minnesota Supreme Court would use *Teague* even it did not have to, is without merit.

4. The Court should grant certiorari to resolve the split of lower court authority on this important issue of first impression.

Respondent claims that "[e]xercise of this Court's discretionary jurisdiction would be more appropriate to resolve a federal question with broader impact among the state courts." (S-BIO at 8). It would be difficult to imagine such a question. The federal question presented here has been the subject of on-the-merits decisions by 15 state courts. Those courts have reached diametrically opposite conclusions on their authority to decide important federal constitutional issues. *Compare, e.g., State v. Forbes*, 119 P.3d 144, 148-49 (N.M. 2005) (deciding, as a matter of state law and equity, to apply holding of *Crawford* to a case that became final in 1987), *cert. denied*, 127 S.Ct. 1482 (U.S. March 5, 2007), *with Danforth*, 718 N.W.2d at 456-47 (holding that state supreme court "cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles").

If the supreme courts of Minnesota, Oregon, and Montana are right, then the appellate courts of Alaska, Florida, Montana, Nevada, Louisiana, Indiana, South Dakota, and New Mexico are wrong. New Mexico, for example, would have no authority to apply *Crawford*'s holding as it did in *Forbes*. *See Bockting*, 127 S.Ct. at 1183-84 (holding that, under *Teague*, *Crawford* does not apply to cases that became final before decision was announced). This Court should grant the petition for writ of certiorari,

resolve the split of authority, and confirm for the state courts their ability to apply federal constitutional rules to a broader class of criminal defendants than those who would be afforded relief in federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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BEST AVAILABLE COPY

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
FEB 14 2007
OFFICE OF THE CLERK

No. 06-8273

In the
SUPREME COURT OF THE UNITED STATES

Stephen Danforth, *Petitioner,*

v.

State of Minnesota, *Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Reviewing only respondent State of Minnesota's Brief in Opposition to the Petition for a Writ of Certiorari (BIO) in this case, one might think that the petition presents only one issue: whether petitioner Stephen Danforth is entitled to benefit from this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), under the retroactivity standard first announced in *Teague v. Lane*, 489 U.S. 288 (1989). The brief in opposition discusses only this issue. (BIO at 9-24). This case, however, presents two issues, and the first – the issue respondent utterly ignores – is perhaps the most important.

The primary issue presented in this case is whether state courts are required, under the Supremacy Clause of the United States Constitution[1] or under United States Supreme Court caselaw, to use the *Teague* retroactivity standard when deciding whether to apply a United States Supreme Court decision retroactively. (See Pet. for Cert. at 6-15). The Minnesota Supreme Court's conclusion that it could not apply a broader retroactivity rule than that used in *Teague* deepened an already deep split of authority amongst the state courts on this issue, which is one of tremendous importance to every state court in the country. Only this Court can resolve this split and this case presents an ideal vehicle for doing so.

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[1] U.S. Const., art. IV, sec. 2 (providing that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

In sum, petitioner urges the Court not to let this petition become lost amongst the plethora of *Whorton v. Bockting*[2]-related petitions that the Court has no doubt received. If the Court decides *Bockting* in favor of the habeas petitioner (respondent before this Court), then the Court could grant, vacate, and remand this case to the Minnesota Supreme Court for further proceedings. If, on the other hand, the Court decides *Bockting* in favor of the Government, then the Court should consider whether to grant certiorari on the first question presented in this case.

The first question presented in this petition is one of vital important to state courts, state-court practitioners, state-court judges, state-court prosecutors, and state-court defendants. This Court should grant certiorari of this case to answer it.

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[2] *Wharton v. Bockting*, ___ U.S. ___, 126 S.Ct. 2017 (2006) (File No. 05-595) (presenting the issue of whether *Crawford* applies to a federal habeas corpus petitioner

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUN 06 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

[Filed Jun. 6, 2007]

STEPHEN DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Minnesota

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JOINT APPENDIX

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Petition for Writ of Certiorari Filed: December 6, 2006
Certiorari Granted Limited to Question 1: May 21, 2007

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Procedural History – Submitted in Lieu of the Docket Listings Pursuant to Sup. Ct. Rule 26(1) and 26(2)

August 28, 1995	Complaint filed in Hennepin County District Court, file number 9507-4990, charging petitioner Stephen Danforth with one count of first-degree criminal sexual conduct, Minn. Stat. § § 609.342, subd. 1(a), 2 (1994); 609.101, subd. 2 (1994); 609.346 (1994).
Feb. 7 – March 6, 1996	July trial held, the Honorable Richard Solum presiding. Petitioner found guilty of the single count against him.
May 13, 1996	The district court sentenced petitioner to 216 months in prison, an upward durational departure from the presumptive sentence under the Minnesota Sentencing Guidelines.
August 8, 1996	The State filed a notice of appeal and informal brief challenging petitioner's sentence.
August 9, 1996	Petitioner filed a notice of appeal and a motion to consolidate the appeals.
December 16, 1997	The Minnesota Court of Appeals affirmed petitioner's conviction, reversed his sentence, and remanded for resentencing. *State v. Danforth*, File Nos. C8-96-1637, C0-96-1650, 573 N.W.2d 369 (Minn. Ct. App. 1997), *rev. denied* (Minn. Feb. 19, 1998).

	On remand, the district court resentenced petitioner to 316 months in prison, a double upward durational departure from the presumptive sentence.
May 4, 1999	The Minnesota Court of Appeals affirmed petitioner's sentence. *State v. Danforth,* File No. C5-98-2054, 1999 WL 262143 (Minn. Ct. App. 1999),
July 28, 1999	The Minnesota Supreme Court denied petitioner's petition for review.
August 23, 2004	Petitioner filed a petition for post-conviction relief challenging his conviction under *Crawford v. Washington* and his sentence under *Blakely v. Washington.*
September 24, 2004	The Honorable Marilyn Brown Rosenbaum denied the petition.
July 26, 2005	The Minnesota Court of Appeals affirmed. *Danforth v. State*, 700 N.W.2d 530 (Minn. Ct. App. 2005).
October 18, 2005	The Minnesota Supreme Court granted petitioner's pro se petition for further review "on the *Crawford* issue only." The Court requested that the Office of the State Public Defender (OSPD) represent petitioner.
October 26, 2005	The OSPD filed a notice of appearance on behalf of petitioner and a motion for extension of time in

	which to file petitioner's brief. The motion was subsequently granted.
July 27, 2006	The Minnesota Supreme Court affirmed. *Danforth v. State*, 718 N.W.2d 451 (Minn. 2006).
December 6, 2006	Petitioner filed a petition for writ of certiorari.
May 21, 2007	The United States Supreme Court granted the petition for writ of certiorari, limited to Question One presented in the petition.

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-96-1637
CO-96-1650

State of Minnesota,
Appellant (C8-96-1637),
Respondent (C0-96-1650),

vs.

Stephen (NMN) Danforth,
Respondent (C8-96-1637),
Appellant (C0-96-1650).

Filed December 16, 1997
Affirmed in part, reversed in part, and remanded
Harten, Judge

Hennepin County District Court
File No. 95074990

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Considered and decided by Huspeni, Presiding Judge, Klaphake, Judge, and Harten, Judge.

SYLLABUS

1. Contact in the parties' absence between the trial judge and a deliberating jury to avoid potential imminent disorder among the jury is left to the sound discretion of the district court and, absent prejudice, is not grounds for reversal.

2. The district court lawfully admitted into evidence the videotaped interview of the child victim of a sex crime after properly declaring the child incompetent to testify at trial under Minn. Stat. § 595.02, subd. 3 (1996).

3. The district court did not abuse its discretion by refusing to instruct the jury that it had found the child victim incompetent to testify.

4. Notwithstanding Minn. Stat. § 609.1352, subd. 1(b) (1996), in implementing the patterned sex offender sentencing provisions of section 609.1352, the sentencing court must impose and execute a sentence of at least double the presumptive guidelines sentence (but not more than the statutory maximum sentence) if the court finds that the defendant meets the criteria in subdivision 1(a) of that statute.

OPINION

HARTEN, Judge

Stephen Danforth was convicted of first-degree criminal sexual conduct for sexually abusing J.S., a six-year-old boy. Danforth appealed his conviction and the state appealed the sentence; the appeals were consolidated.

Danforth asserts that irregularities during jury deliberations deprived him of a fair trial. Danforth also argues that the district court erred in admitting a videotaped interview of J.S., after finding J.S. incompetent to testify at trial, because the videotape constituted hearsay that violated his right to confrontation. Finally, Danforth claims that the district court erred in failing to instruct the jury that J.S. had been found

incompetent to testify and by disallowing the parties to mention that finding.

The state argues that the district court erred by departing from statutory mandates in implementing Minn. Stat. § 609.1352 (1996) in that it failed to sentence Danforth to an executed term of imprisonment of not less than double the presumptive sentence.

We affirm Danforth's conviction, but reverse in part and remand for resentencing in accordance with Minn. Stat. § 609.1352 and this opinion.

FACTS

Danforth is a multiply-convicted pedophile with an extensive history of sexually abusing young boys during the 1970's and 1980's. Danforth and J.S.' parents, particularly J.S.' father, were close friends for many years; Danforth was like a "favorite uncle" to J.S. and his siblings, having spent a great deal of time with the family.

On August 11, 1995, a neighbor discovered six-year-old J.S. with his pants down atop a younger girl, acting in a sexual manner. When confronted by his mother and asked where he had learned such things, J.S. said that "Steve" had put his mouth on J.S.' "pee-pee" and his finger in J.S.' "poopie butt." That evening, J.S.' mother called the police to report the alleged sexual abuse.

When interviewed by the police, J.S. said that "Steve" had put his "pee" in his buttocks and that "Steve" had made him "kiss his pee." On August 23, 1995, J.S. was interviewed at CornerHouse, a non-profit sexual abuse center. J.S. gave substantially similar information during this videotaped interview and clearly indicated that he had been sexually abused by Danforth. Danforth was then arrested and charged with first-degree criminal sexual conduct.

The trial was lengthy, lasting from February 7 through March 6, 1996. Danforth, a disbarred attorney, represented himself for much of the trial, although he had access to stand-by counsel.

On the day that testimony was scheduled to begin, a competency hearing was held to determine whether J.S. and his five-year-old sister, A.S., were competent to testify. Danforth strongly urged the district court to find J.S. incompetent and to rule the CornerHouse videotape inadmissible. The state agreed that J.S. appeared incompetent to testify, but argued that the videotape was nevertheless admissible. Because J.S. had limited ability to focus on questions and give relevant answers, the district court declared him incompetent. The district court found A.S. competent to testify, however, because she exhibited a far superior ability to concentrate than J.S.

The district court admitted the videotape because it found that the taped conversations bore sufficient indicia of reliability. Among other factors, the district court noted that J.S.' remarks appeared spontaneous and largely unsolicited by leading questions, and that J.S. lacked any apparent motivation to fabricate the accusation.

At trial, the jury viewed the CornerHouse videotape, and A.S. testified that she had seen "Steve" put his mouth on J.S.' "pee-pee" and "private" one day in the men's room by the pool at their aunt's apartment. A.S. did not identify Danforth in the courtroom, however. The state called former victims to testify about the sexual abuse underlying some of Danforth's previous convictions.

Danforth testified on his own behalf He claimed that J.S.' parents trumped up the charges because J.S.' father was repulsed by Danforth's admitted homosexuality and J.S.' mother was angry with Danforth for various disparaging comments and criticism of her parenting skills. Danforth also

claimed that he was reformed and understood the evil of his past ways.

The jury convicted Danforth of first-degree criminal sexual conduct. The district court denied Danforth's detailed motion for a new trial and sentenced him to an executed term of imprisonment of 216 months, an upward durational departure of 58 months, but less than double the presumptive sentence, which the state asserted was the minimum sentence required under Minn. Stat. § 609.1352 (the patterned sex offender statute).

ISSUES

1. Did irregularities in the jury deliberation process deprive Danforth of a fair trial?

2. Did the district court err in admitting the CornerHouse videotape?

3. Did the district court err by refusing to instruct the jury that J.S. had been found incompetent to testify and by prohibiting the parties from mentioning that finding to the jury?

4. Did the district court err in implementing Danforth's sentence as a patterned sex offender under Minn. Stat. § 609.1352?

ANALYSIS

1. Jury deliberation process.

a. Judge's contact with jury.

Danforth argues that the district court committed reversible error by addressing the jury outside his and counsels' presence and in forcing the jury to deliberate until they reached a verdict.

Contact between the judge and jury without notice to the parties is generally considered error, but will be grounds for reversal only if appellant shows that the contact was prejudi-

cial. *State v. Kelley*, 517 N.W.2d 905, 908 (Minn. 1994). Contact between the judge and jury on matters not substantively relating to the case (such as matters relating to physical comfort and the like), however, is not necessarily error and is left to the sound discretion of the district court. *Id.* at 908-09.

Only hours into jury deliberations, following weeks of trial, juror L sent a note to the district court, complaining about the lack of air flow in the jury room and claiming that the jury was "hopelessly deadlocked." Despite the juror's premature conclusion that the jury was deadlocked, the district court gave the note serious attention and called the parties to the courtroom to discuss what response should be given. The parties, including Danforth, agreed that one of the jury instructions should be reread to the jury and that they should be sent back for further deliberations.

Later that same day, the bailiff informed the district court that tensions in the jury room were running high and that he believed violence could be imminent. The bailiff also said that one of the jurors, juror H, was threatening to leave. Because it had taken over 45 minutes to convene the parties following juror L's note, the district court spoke with juror H and then the entire jury without first notifying counsel or Danforth.

The district court's remarks to juror H and the rest of the jury were on the record and were limited to matters necessary to enable the jury to continue deliberating. Far from coercing the jury to deliberate until they reached a verdict, the district court attempted to correct some jurors' misimpression that they Were not allowed to become a hung jury and reassured them that it was only asking them to deliberate until the next day. The district court's remarks were merely a *request* for cooperation, diligence, and goodwill and an assurance that the jurors were still free to do as they wished.

In Kelley, the Minnesota Supreme Court cited the A.B.A. Standard Relating to Trial by Jury 15-4.4(b) (i986) with approval:

> "If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals."
>
> The commentary to Standard 15-4.4(b) states that:
>
> [A] court may send the jury back for additional deliberations even though the jury has indicated once, twice, or several times that it cannot agree or even after jurors have requested that they be discharged. * * * [A] jury should not be permitted to avoid a reasonable period of deliberation merely by repeated indications that it is unable to agree.
>
> Instead, the real question is whether the jury was required to deliberate an unreasonable length of time or for unreasonable intervals, or was threatened with the prospect of such unreasonably lengthy deliberations. The general rule is that the length of time a jury may be kept deliberating is a matter within the discretion of the trial judge, but abuse of that discretion requires reversal. The reasonableness of the deliberation period depends on such factors as the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement.

Kelley, 517 N.W.2d at 909. We conclude that under the circumstances the district court did not abuse its discretion by encouraging the jury to work together for a few more hours to try to reach a verdict.

Danforth takes exception to his not being informed until the next morning of the rising tensions and the measures taken to diffuse them. Although it might have been more prudent to notify counsel and Danforth immediately of the further difficulties, the situation needed direct attention, and the parties probably could not have been reassembled quickly enough to avert substantial upset to the process.[1] Furthermore, Danforth shows no apparent prejudice from not being informed of the situation until morning; the jury went to dinner after meeting with the judge and did not continue its deliberations until the next morning.

We conclude that the district court's handling of the volatile situation was within its discretion and commendable under the circumstances.

b. Atmosphere of violence.

Danforth claims that an atmosphere of violence so pervaded the jury deliberation process that some jurors were coerced into their verdict. Although the bailiff warned the judge of the situation because he felt that violence could erupt, the bailiff appears to have been taking reasonable precautionary measures to ensure that the situation was contained before it got out of hand. The record indicates that many jurors felt strongly about the case and that tempers were short, but it does not support Danforth's contention that juror H actually threatened other jurors with violence.

Immediately after receiving the verdict, the district court asked each juror whether the tensions during deliberations influenced their verdict, and all jurors indicated that they had not been unduly influenced. Although the level of tension among jurors was less than ideal, there is no evidence that it rose to a level that prejudiced Danforth.

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[1] In his pro se reply brief at 7, Danforth himself recognizes that it 'is very probably in this case * * * that but for the trial judge's intervention, * * * or [H] would have made good on his threat to leave the jury."

c. Jury's review of audiotape not admitted into evidence.

By agreement of the parties, a transcript (instead of the audiotape) of police interrogation of Danforth was admitted at trial with certain portions relating to possible abuse of A.S. redacted. During deliberations, however, the jury inadvertently listened briefly to the audiotape before realizing that they were not supposed to have the tape.[2]

After this inadvertence was brought to his attention, the district court inquired of counsel and the parties what to do. The parties together crafted a curative instruction to be read to the jury, which Danforth and his counsel both specifically agreed would be adequate. Only later, *after* the jury announced its guilty Verdict, did Danforth request a mistrial based on the jury's exposure to the redacted statements. Accordingly, Danforth waived his right to seek reversal based on any prejudice that might have been caused by the jury's accidental exposure to the audiotape. *See State v. Fields*, 529 N.W.2d 353, 356-57 (Minn. App. 1995) (defendant's failure to move for mistrial before verdict precluded him from raising claim that incident in courtroom involving victim's father warranted new trial), *review denied* (Minn. Apr. 27, 1995); *State v. Yant*, 376 N.W.2d 487, 490-91 (Minn. App. 1985) (defendant waived right to object to sleeping jurors, where he was apprised of matter during trial and elected not to move for mistrial or request alternate seating before verdict), *review denied* (Minn. Jan. 17, 1986).

Nevertheless, to address the possibility of prejudice, the district court wisely conducted a *Schwartz* hearing after the verdict, and each of the jurors stated that listening to the audiotape had no impact upon his or her verdict.

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[2] The jury apparently heard the following redacted statements: Investigator: Okay. Okay, how about [A.S.]? [A.S] also during the interview said that there had been some inappropriate touching of her sexual - on her genitals, her sexual area. Danforth: Oh, no, no, no, no, never, not for either of them.

In sum, we find no abuse of discretion or prejudicial error in the district court's handling of the irregularities in the jury deliberation process.

2. Admission of CornerHouse videotape.

Appellate courts largely defer to the district court's exercise of discretion in evidentiary matters and will pot lightly overturn a district court's evidentiary ruling. *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). If the admission of evidence violated a constitutional right, however, a new trial is required unless the state can show beyond a reasonable doubt that the error was harmless. *State v. Scott*, 501 N.W.2d 608, 619 (Minn. 1993).

The district court admitted the CornerHouse videotape in accordance with Minn. Stat. § 595.02, subd. 3:

> An out-of-court statement made by a child under the age of ten years * * * alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child * * * not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:
>
> (a) the court or person authorized to receive evidence finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and
>
> (b) the child * * * either:
>
> (i) testifies at the proceedings; or
>
> (ii) is unavailable as a witness and there is corroborative evidence of the act; and
>
> (c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the

> proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.
>
> For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

In addition, the Minnesota Supreme Court has held that recorded interviews of child sexual abuse victims must be shown to bear the "particularized guarantees of trustworthiness" required under *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990). *Scott*, 501 N.W.2d at 616. This requirement is essentially incorporated in subdivision 3(a) of Minn. Stat. § 595.02, but the supreme court has listed various nonexclusive factors that bear on the reliability of the hearsay statements, including: spontaneity and consistent repetition, mental state of declarant, use of terminology unexpected of a child of a similar age, lack of motive to fabricate, suggestiveness of prior questioning or leading questions during interview, preconceptions during the interview of what the child should say, and whether the statements are the type of statements one would expect a child of that age to fabricate. *Scott*, 501 N.W.2d at 617 (citing *Idaho v. Wright*, 497 U.S. at 821, 110 S. Ct. at 3150 and *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990)).

Given J.S.' strong and substantially consistent statements regarding the abuse, his attention-deficit problems (which render him relatively impervious to suggestion and coaching), his apparent lack of motive to fabricate an allegation harming an avuncular figure, and the professionalism of the CornerHouse interview, we agree with the district court that the videotape was sufficiently reliable to be admitted into evidence.

We further conclude that there was sufficient corroborating evidence to admit the videotape, as required under Minn. Stat.

§ 595.02, subd. 3(b)(ii). A.S. had previously stated that she had seen Danforth sexually abuse J.S. The fact that A.S. did not identify Danforth at trial does not negate all corroborating value of her statements. There are many possible explanations why A.S. might not have been able to identify Danforth in the courtroom. Aside from the facts that Danforth had lost weight and it had been a long time in a child's timeframe since she had last seen him, the record suggests that A.S. simply may have been confused by the courtroom identification process.

Danforth also argues that the videotape's admission is particularly objectionable because the district court erred in finding J.S. incompetent to testify at trial. But Danforth strongly urged the district court to find J.S. incompetent to testify, thereby waiving his right to challenge the incompetency ruling on appeal. *Yant*, 376 N.W.2d at 490-91. Here, as in *Yant*, "the trial judge was eminently fair, and looked to the attorneys for some direction." *Id.* at 491. Danforth made a tactical trial decision to urge a finding of incompetence, possibly hoping that both J.S.' testimony and the videotape would be excluded. But both were not excluded, and Danforth now must live with that.

Danforth finally argues that the incompetency finding rendered the CornerHouse videotape unworthy of belief. Far from finding J.S. untruthful and lacking the ability to remember anything relevant to the allegations, the district court thoughtfully opined that J.S. had an ability to know and remember the truth, but that J.S. was not capable of paying attention long enough to communicate meaningfully to the jury in a trial setting. We conclude that Danforth's argument is without merit.

3. Finding of incompetency withheld from jury.

Danforth argues that the district court deprived him of the right to present a complete defense by refusing to instruct the jury that it had found J.S. incompetent to testify and prohibit-

ing either party from mentioning that finding to the jury. The jury was simply informed that J.S. was "unavailable" to testify.

The district court had discretion in fashioning an appropriate response to both parties' requests for a jury instruction regarding the incompetency finding. *See State v. O'Hagan*, 474 N.W.2d 613, 620 (Minn. App. 1991) ("Refusal to give a proposed jury instruction lies within the discretion of the trial court and there is no error absent an abuse of discretion."), *review denied* (Minn. Sept. 25, 1991).

The district court understood that its finding of incompetency did not necessarily mean that J.S.' testimony was incredible. The district court was concerned that instructing the jury that it had found J.S. incompetent might mislead the jury or cause the jury to conclude that J.S. was too frightened by Danforth to testify. And the jury could interpret such an instruction to reflect the district court's opinion of J.S.' credibility. The district court decided simply to instruct the jury that J.S. was unavailable and to prohibit the parties from mentioning the incompetency finding.[3] We cannot say that such a decision was an abuse of discretion.

4. Sentencing Danforth as "patterned sex offender."

The state argues that because the district court found that Danforth met the requisite three prongs to be sentenced as a patterned sex offender under Minn. Stat. § 609.1352, subd. 1(a), the district court was obliged to impose a sentence of at least double the presumptive sentence. Minn. Stat. § 609.1352, subd. 1, provides:

> Sentencing authority. (a) A court shall[4] commit a person to the commissioner of corrections for a period of time that is

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[3] Danforth nevertheless mentioned the incompetency finding in the presence of the jury in one of his questions during cross-examination of a witness.

[4] The legislature replaced may with shall in 1992.

not less than double the presumptive sentence under the sentencing guidelines and not more than the statutory maximum * * * if:

(1) the court is imposing an executed sentence, based on a sentencing guidelines presumptive imprisonment sentence or a dispositional departure for aggravating circumstances or a mandatory minimum sentence, on a person convicted of committing or attempting to commit a violation of section 609.342 * * *;

(2) the court finds that the offender is a danger to public safety; and

(3) the court finds that the offender needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release. The finding must be based on a professional assessment by an examiner experienced in evaluating sex offenders that concludes that the offender is a patterned sex offender. The assessment must contain the facts upon which the conclusion is based, with reference to the offense history of the offender or the severity of the current offense, the social history of the offender, and the results of an examination of the offender's mental status unless the offender refuses to be examined. The conclusion may not be based on testing alone. A patterned sex offender is one whose criminal sexual behavior is so engrained that the risk of reoffending is great without intensive psychotherapeutic intervention or other long-term controls.

(b) The court shall consider imposing a sentence under this section whenever a person is convicted of violating section 609.342 or 609.343.

(Footnote added).

The district court believed that even if it found all three prongs necessary to sentence Danforth as a patterned sex

offender under subdivision 1(a), it still had discretion whether to impose the "not less than double the presumptive sentence" required by the statute. The statute states in plain language, however, that a court *shall* sentence a defendant to not less than double the presumptive sentence *if* the court finds that the three patterned sex offender prongs are met. Thus, a court does not have the discretion to withhold imposition of a double departure (but not more than the statutory maximum) once it finds that the three prongs have been met.

Subdivision 1(b) states that the court "shall consider" imposing the enhanced sentence for patterned sex offenders whenever a person is convicted under section 609.342 or 609.343. Because sections 609.342 and 609.343 (first-and second-degree criminal sexual conduct) are the most serious levels of sexual offenses, these offenses are singled out in subdivision 1(b) to require courts to *consider* imposing the enhanced sentence under the statute whenever a person is convicted of one of these crimes, even on a first offense. The other crimes listed in the statute are either lesser sexual crimes or other "predatory crimes" that do not necessarily involve sexual motivation. Thus, in harmonizing any purported conflict between subdivision 1(b) and subdivision 1(a), we conclude that subdivision 1(b) does not negate the mandatory nature of the sentencing provisions under subdivision 1(a) provided the court finds that the three patterned sex offender prongs have been met.

When a person is convicted under section 609.342 or 609.343, the court must consider whether the three prongs under Minn. Stat. § 609.1352, subd. 1(a), are met. If it decides that they are met, it must impose not less than double the presumptive sentence for the crime, not to exceed in any case the statutory maximum.[5] The court must then also

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[5] Minn. Stat. § 609.1352, subd. 4, which states that a "sentence imposed under subdivision 1 is a departure from the sentencing guidelines" gives no additional discretion to the district court in

impose a conditional release term of ten years or the remainder of the statutory maximum period, whichever is longer. Minn. Stat. § 609.1352, subd. 5. The court may not, however, impose the extended conditional release period under subdivision 5 without having invoked the enhanced sentencing provisions for patterned sex offenders under subdivision 1(a), as it did in this case. In other words, a court may not use subdivision 5 independently of subdivision 1(a).

We are particularly concerned with the district court's stated reliance on potential future civil commitment as a sexually dangerous person in sentencing Danforth. Because incapacitation alone is not a constitutionally permissible ground for civil commitment without a diagnosed mental disorder coupled With a legitimate attempt to treat it,[6] use of the civil commitment process is not to be anticipated or invited as a substitute for criminal incarceration to incapacitate chronic sex offenders.

Whenever a court sentences a defendant as a patterned sex offender, it has necessarily found that the defendant is a danger to public safety and needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release. Minn. Stat. § 609.1352, subd. 1(a)(2), (3). The legislature has decided that anyone meeting such criteria warrants lengthy incarceration.

Accordingly, we reverse in part and remand for resentencing consistent with Minn. Stat. § 609.1352 and this opinion.

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sentencing as a patterned sex offender. It merely acknowledges that the enhanced sentences under subdivision 1 are guideline departures; it also eliminates possible arguments that the guidelines were still meant to control for the crimes underlying sentencing as a patterned sex offender and that additional Aggravating factors other than those implicit in a patterned sex offender finding are necessary for the enhanced sentence.

[6] See In re Blodgett, 510 N.W.2d 910 (Minn. 1994) (discussing constitutionality of psychopathic personality commitment statute).

We have painstakingly considered each of Danforth's numerous additional arguments presented in his pro se brief (some of which relate to the main claims addressed in this opinion) and find them to be without merit.

DECISION

Irregularities in the jury deliberation process did not deprive Danforth of a fair trial or involve district court abuse of discretion. The district court did not err in admitting a videotape interview of the victim or in refusing to instruct the jury or allow comment on the fact that the victim was found incompetent. The district court properly entered judgment convicting Danforth of first-degree criminal sexual conduct, but improperly applied Minn. Stat. § 609.1352 in sentencing, thereby requiring a remand for resentencing.

Affirmed in part, reversed in part, and remanded.

James C. Harten

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (1998).

STATE OF MINNESOTA
IN COURT OF APPEALS

C5-98-2054

STATE OF MINNESOTA,
Respondent,

vs.

STEPHEN DANFORTH,
Appellant.

Filed May 4, 1999

Affirmed

Kalitowski, Judge
Hennepin County District Court
File No. 95074990

Mike Hatch, Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Amy Klobuchar, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

John M. Stuart, State Public Defender, Lyonel Norris, Assistant State Public Defender, 2829 University Avenue S.E., Suite 600, Minneapolis, MN 55414 (for appellant)

Considered and decided by Kalitowski, Presiding Judge, Klaphake, Judge, and Huspeni, Judge.[*]

UNPUBLISHEDOPINION

KALITOWSKI, Judge

Appellant Stephen Danforth contends the district court erred by: (1) denying his request for a continuance; and (2) denying his notice of removal of the sentencing judge. In his pro se brief, appellant raises several challenges to his sentencing. We affirm.

DECISION

I.

The decision to grant a continuance is vested in the sound discretion of the trial court. *State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984). In determining whether the trial court soundly exercised its discretion, this court must

> examine the circumstances before the trial court when the motion was made to determine whether the defendant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial.

Id. To find reversible error, the court must find the error affected the outcome of the case. *State v. Jones*, 451 N.W.2d 55, 61 (Minn. App. 1990), *review denied* (Minn. Feb. 21, 1990).

A sentencing hearing should be scheduled so that "the parties have adequate time to prepare and present arguments regarding the issue of sentencing." Minn. Stat. § 244.10, subd. 1 (1996). Due process requires that a defendant have notice, an opportunity to be heard, and an opportunity to confront and cross-examine witnesses at a sentencing hearing. *State v. Kortkamp*, 560 N.W.2d 93, 96 (Minn. App. 1997).

On May 27, 1998, the district court continued appellant's sentencing pending findings by the court psychologist, Dr. Lawrence Panciera, Ph.D., L.P., due to the court no later than June 19, 1998. Sentencing was rescheduled for August 4,

1998. The psychological report (Panciera Report) was dated July 1, 1998, and presumably was received by the court soon after. Appellant's counsel received the report July 21, but was unable to get it to appellant immediately due to a "lockdown" at the Stillwater Correctional Facility. Appellant requested a continuance on July 30, 1998, to secure more time to address the information in the report. On August 3, 1998, the court held a phone conference with the prosecutor and counsel for appellant on the matter, and the court refused to continue the sentencing. Sentencing was concluded the following day.

Appellant contends the district court erred because appellant had inadequate time to prepare to confront and cross-examine Dr. Panciera at the sentencing hearing and inadequate time to produce an expert to refute the Panciera Report. We disagree. The record indicates: (1) appellant and his counsel were aware that the psychological report was being compiled as of the May 27, 1998, court order; (2) appellant knew his psychological condition would be at issue; (3) appellant could have, but did not, hire his own expert prior to receiving the Panciera Report at any time between May 27 and July 21; (4) appellant had one to two weeks after receiving the Panciera Report to prepare for the hearing; and (5) appellant did not attempt to either examine or subpoena Dr. Panciera. We conclude appellant had ample opportunity to prepare to refute the Panciera Report and was not materially prejudiced because his continuance request was denied.

Appellant argues that because he did not receive the court's notice of its intent to sentence him as a patterned sex offender under Minn. Stat. § 609.1352 (1996), it was error for the court to apply that statute. We disagree. At appellant's original sentencing, the court found the patterned sex offender factors were present, but did not sentence according to the statute. On appeal, this court directed the district court to follow the sentencing scheme in the patterned sex offender statute. *See State v. Danforth*, 573 N.W.2d 369, 377 (Minn.

App. 1997), *review denied* (Minn. Feb. 19, 1998) (interpreting Minn. Stat. § 609.1352). Because that opinion was issued on December 16, 1997, appellant had notice in December 1997 that he would be sentenced as a patterned sex offender.

II.

Appellant argues the court erred in denying his motion for removal of the judge who presided at his sentencing. Whether a removal notice is proper is a question of law. *Citizens State Bank v. Wallace*, 477 N.W.2d 741, 742 (Minn. App. 1991). A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. *Frost-Benco Elec. Ass'n v. Minnesota Pub.* Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). Failure to honor a proper removal notice is reversible error requiring a new hearing. *Citizens State Bank*, 477 N.W.2d at 742 (stating rule in context of civil case).

A defendant may serve notice to remove a judge assigned to a hearing, but the defendant must serve and file that notice within seven days after receiving notice of which judge is to preside at the hearing, and not later than the commencement of the trial or hearing. Minn. R. Crim. P. 26.03, subd. 13(4). Notice to remove is not effective against a judge who has already presided at a trial, omnibus hearing, or other evidentiary hearing except upon a showing of cause. *Id.*

The district court notified the parties as to which judge would be presiding in this matter in a conference call on July 16, 1998. Appellant did not request removal until the hearing on August 4. Appellant argues the seven-day rule should not apply because he did not receive the Panciera Report until a week before the date set for resentencing, and he did not have an opportunity to discuss the matter with counsel until after the deadline for filing had passed. We disagree. The rule allowing removal does not provide exceptions or extensions

for events that occur after a judge is assigned. We conclude notice of removal was not timely, and the district court did not err by denying the removal request.

III.

Appellant argues he was not accorded his right of allocution at his sentencing hearing, and was therefore denied due process. We disagree. The right of allocution does not allow appellant to give "any information" before sentence, as appellant contends, but instead allows him only to give "any matter relevant to the question of sentence." Minn. R. Crim. P. 27.03, subd. 3. Because the district court gave appellant ample opportunity and instruction to focus his comments on the sentencing issues, we conclude the district court did not violate appellant's right of allocution by cutting short his statement.

IV.

Appellant argues the court improperly relied on the Panciera Report in his sentencing and that it was not timely filed. The trial court has discretion to determine what type of evaluations to admit into evidence. *Peterson v. Peterson*, 408 N.W.2d 901, 904 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987). A trial judge is not bound by the same rules of evidence in sentencing as in the trial. *State v. Adams*, 295 N.W.2d 527, 535 (Minn. 1980).

For the court to sentence a defendant as a patterned sex offender, it must find that the defendant needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release. Minn. Stat. § 609.1352, subd. 1(a)(3). The finding must be based on a professional assessment, and the assessment

> must contain the facts upon which the conclusion is based, with reference to the offense history of the offender or the severity of the current offense, the social history of the

> offender, and the results of an examination of the offender's mental status unless the offender refuses to be examined.

Id. The statute continues:

> The conclusion may not be based on testing alone. A patterned sex offender is one whose criminal sexual behavior is so engrained that the risk of reoffending is great without intensive psychotherapeutic intervention or other long-term controls.

Id. (emphasis added).

Appellant refused to submit to testing or interviews for his professional assessment, so the court psychologist based his evaluation on records submitted to the court and on research in a previously implied psychological report. We conclude the district court did not err by relying on the Panciera Report because: (1) it was appropriate to look at information more than ten years old to determine whether appellant's criminal sexual behavior is "engrained"; (2) the report was proper even though Dr. Panciera compiled it without direct contact with appellant because the statute allows a defendant to be sentenced under the statute without a direct psychological screening. *See* Minn. Stat. § 609.1352, subd 1(a)(3) (stating assessment must contain results of examination of offender's mental status unless offender refuses to be examined); (3) the court did not err in allowing the report to rely on documents not in the court file, because the statute requires a broad look into a defendant's background. See Minn. Stat. § 609.115, subd. 1 (1996) (stating presentence investigation reports may be based on individual's "characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community"); and (4) appellant's hearsay concerns are unfounded, because the introduction of hearsay evidence at a sentencing hearing does not violate a

defendant's due process rights. *State v. Adams*, 295 N.W.2d 527, 536 (Minn. 1980).

Finally, we conclude the court did not err by allowing the Panciera Report to be filed after the court's deadline because the court has the discretion to set and extend nonstatutory deadlines. *See Housing & Redev. Auth. v. Kotlar*, 352 N.W.2d 497, 500 (Minn. App. 1984) (finding trial court within its discretion in setting deadline to produce documents and dismissing case when documents were not filed before deadline).

V.

Appellant argues the court erred by imposing a more severe sentence than that proposed in plea bargaii negotiations and imposed at his original sentencing. We disagree. The court is not limited to a sentence proposed by the state and declined by defendant. *State v. Ackerley*, 296 Minn. 495, 496, 207 N.W.2d 272, 273 (1973). Further, the state may appeal a defendant's sentence without offending double jeopare principles even though its success might deprive the defendant of the benefit of a more lenient sentence *United States v. DiFrancesco*, 449 U.S. 117, 132, 101 S. Ct. 426, 435 (1980). Also, if a defendant doe not have a crystallized expectation of finality in his or her sentence, there is no due process or double jeopardy bar to amending it. *State v. Humes*, 581 N.W.2d 317, 321 (Minn. 1998).

Here, the district court was instructed by this court to impose a double durational departure according t the patterned sex offender statute if certain findings were made. *See Danforth*, 573 N.W.2d at 377 (interpreting Minn. Stat. § 609.1352). The state appealed the original sentence within the prescribed tir period and appellant did not have a crystallized expectation in his sentence. We conclude the court did not err in increasing appellant's original sentence.

VI.

Appellant contends the court violated his due process rights by substituting a different judge for his sentencing hearing from the judge who presided at trial. We disagree. The judge who presided at appellant's trial retired and the substitute judge stated in the record that he was acquainted with the file and the remaining issues and that he was fully capable of going forward with the case. *Cf.* Minn. R. Crim. P. 26.03, subd. 13(1) (allowing substitution even during trial if judge is disabled from proceeding and substitute judge certifies familiarity with record).

VII.

Appellant argues the district court improperly penalized him for exercising his rights of freedom of speech and against self-incrimination. We disagree. Appellant chose not to cooperate with the evaluator for the psychological report. The court did not comment negatively on appellant's decision not to participate, and the report makes no negative inferences based on appellant's refusal to speak. Although the report may have benefited from appellant's participation, appellant was not punished for expressing his rights and his First and Fifth Amendment rights were not violated.

VIII.

Appellant contends the language in Minn. Stat. § 609.1352, subd. 1, is unconstitutionally vague. Appellant did not raise this argument at the district court so we decline to address it here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding appellate courts only consider matters presented to and considered by district court).

IX.

Appellant argues the court cannot sentence him as a patterned sex offender because the state did not give notice until trial of its intent to pursue sentence enhancement under the statute. We disagree. The statute in question is a sentencing provision that neither affects the charges filed in a criminal complaint nor adds any elements of a crime. Therefore, the state was not required to notify appellant at the time of the original complaint that the prosecution would seek sentencing under the statute. *See State v. Christie*, 506 N.W.2d 293, 298 (Minn. 1993) (holding that patterned sex offender statute did not add elements of crime and did not create presumption of guilt, but only introduced factors that come into play after defendant has been found guilty of particular crime).

Affirmed.

(*) Retired judge of the Minnesota Court of Appeals, serving by apointment pursuant to Minn. Const. art. VI, § 10.

STATE OF MINNESOTA
IN SUPREME COURT

C5-98-2054

State of Minnesota,
Respondent,

vs.

Stephen Danforth,
Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Stephen Danforth for further review be, and the same is, denied.

Dated: July 28, 1999

BY THE COURT:

/s/: Kathleen A. Blatz

Kathleen A. Blatz
Chief Justice

STATE OF MINNESOTA
DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT

STEPHEN (NMN) DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

The above-entitled matter came on before the Honorable Marilyn Brown Rosenbaum pursuant to Petitioner's Petition for Post-Conviction Relief and Motion for Correction of Sentence. After submissions by both parties, the Court took the matter under advisement on September 14, 2004.

Stephen Danforth, Petitioner, appears *pro se* and submitted memoranda and reply memoranda on his own behalf.

Amy E. Sweasy, Assistant County Attorney, submitted a memorandum on behalf of the State of Minnesota.

The Court, having reviewed the documents and files herein and being fully informed in the premises makes the following;

FINDINGS OF FACT

1. Petitioner is currently incarcerated in the State of Minnesota.

2. On March 6, 1996, Petitioner, after trial by jury, was found guilty by jury verdict of first degree criminal sexual conduct. On April 29, 1996, Petitioner was sentenced to an executed term of imprisonment of 216 months.

3. Petitioner appealed his conviction claiming: 1) irregularities during jury deliberations deprived him of a fair trial; 2) the Court erred in admitting the videotaped interview of J.S., after finding J.S. incompetent to testify at trial, because the videotape constituted hearsay that violated his right to confrontation; 3) the Court erred in failing to instruct the jury that J.S. had been found incompetent to testify and by disallowing the parties to mention that finding.

4. The State appealed the sentencing claiming the Court erred by departing from statutory mandates in implementing Minn. Stat. § 609.1352 (1996) because it failed to sentence Petitioner to an executed term of imprisonment of not More than double the presumptive sentence.

5. On December 16, 1997, the Minnesota Court of Appeals affirmed the conviction, but remanded the case for resentencing in accordance with Minn. Stat. § 609.1352. *State v. Danforth,* 573 N.W.2d 369 (Minn. Ct. App. 1997).

6. On remand, Petitioner was sentenced to an executed term of 316 months.

7. Petitioner appealed the resentencing contending that the Court erred by 1) denying his request for a continuance; and 2) denying his notice of removal of the sentencing judge.

8. On May 4, 1999, the Minnesota Court of Appeals affirmed the resentencing. *State v. Danforth*, No. C5-98-2054, 1999 In 262143 (Minn. Ct. App. 1999).

9. On September 9, 1999, Petitioner filed a Petition for Post-Conviction Relief pursuant to Minn. Stat. § 590.01 *et seq*. demanding a hearing and arguing that this Court should vacate and set aside his conviction and sentence or, in the alternative, grant a new trial.

10. In the Petition for Post Conviction Relief, Petitioner claimed: 1) new polygraph evidence should be admitted which requires acquittal or a new trial and appointment by the

Court of polygraphist, Darrell Shaw, as an expert for Petitioner, who is proceeding "in forma pauperis"; 2) the admission of the CornerHouse videotape prejudiced Petitioner and requires a new trial as it violated the confrontation clause; 3) the Trial Court did not conduct a "taint" hearing before allowing the two children to testify; 4) ineffective assistance of former pretrial counsel; 5) ex parte hearings hearings and conferences held by the Trial Court without the Petitioner's knowledge violated Petitioner's right to self representation; 6) issues surrounding preparation of the CornerHouse videotape deprived Petitioner of rights afforded by the confrontation clause; 7) testimony of witness Martinetti improperly bolstered the credibility of J.S.'s videotaped responses ("vouching claim"); 8) the Trial Court's refusal to allow discover of J.S's school records violated Petitioner's confrontation and due process rights; 9) admission of audiotape in which Petitioner invoked Miranda rights caused irremedial prejudice to Petitioner requiring a new trial; 10) the prosecution withheld evidence in violation of Minn.R.Civ.P. 7.01, the confrontation clause affecting Petitioner's right to present his defense, his right to a jury trial, and due process; 11) prosecutorial misconduct regarding Dr. Cotter ("discovery violation"); 12) prosecutorial misconduct regarding conversations with Juror Chiles; 13) Juror Hall's non-disclosure deprived Petitioner of his right to an impartial jury; 14) new evidence in Petitioner's 1995 phone bill requires a new trial; 15) failure of officers to keep notes and the prosecution's refusal to disclose notes of conversations with victims violated Petitioner's due process rights and right to confront witnesses; 16) closure of the courtroom during testimony of A.S., a child, deprived Petitioner of a public trial and due process; 17) improper contacts between the Court and jurors deprived Petitioner of his rights to a trial by jury and to a fair trial; 18) the Court's reliance on psychological report in resentencing was improper.

11. The Petition for Post-Conviction Relief was denied, and upon appeal, on December 5, 2000, the Minnesota Court of Appeals affirmed this Court's denial of post-conviction relief. *Danforth v. State*, No. C6-00-699, 2000 WL 1780244 (Minn. Ct. App. 2000).

12. Petitioner now brings a Petition for Post-Conviction Relief based upon the decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), asserting that *Crawford* would have required a finding that the CornerHouse tape was' inadmissible evidence and that his conviction should be reversed.

13. Petitioner also brings a Motion for Correction of Sentence based upon the decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), asserting that *Blakely* invalidates the enhancement of his sentence beyond the presumptive range of the Minnesota Sentencing Guidelines.

14. Petitioner's appellate rights are exhausted and his case is not under direct review by any Courts.

15. At trial, the child victim was found incompetent to testify and therefore unavailable. A ComerHouse tape was presented to the jury pursuant to Minn. Stat. § 595.02, subd. 3.

16. By the Notice of Motion and his Proposed Order, Petitioner has requested a hearing pursuant to Minn. Stat. § 590.04, and seeks relief including vacation of his conviction and resentencing, a new trial, or in the alternative, resentencing.

CONCLUSIONS OF LAW

1. The Court has jurisdiction pursuant to Minn. Stat. §§ 590.01 et seq. and has promptly considered the issues.

2. Petitioner's request for a hearing should be denied because the Petition, files and records conclusively show that

Petitioner is deserving of no relief under either theory presented to the Court.

3. Petitioner's Petition for Post-Conviction Relief is denied. *Crawford v. Washington*, 124 S. Ct. 1354 (2004) is not retroactive.

4. *Crawford* announced a new rule of law not dictated by precedent at the time Petitioner's conviction became final in 1998. At that time, the rule of law derived from *Ohio v. Roberts*, 448 U.S. 56 (1980), which was overruled by *Crawford*. *Crawford*. created a new rule of law that applies only to pending cases and those on direct appeal at the time *Crawford* was decided. Minnesota Courts limit retroactive application to cases pending when a new rule of law is announced. *See O 'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004). If a conviction is final at the time the new rule of law is announced, a defendant may not ordinarily avail himself or herself of the new rule. *See id., citing Teague v. Lane*, 489 U.S. 288, 310-11 (1989). A court's decision creates a new rule of law when the decision was not dictated by precedent existing at the time the defendant's conviction became final. *See id.*

5. Petitioner's Motion for Correction of Sentence is denied. The decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) is not retroactive. This Court adopts the reasoning as set forth in paragraph 4 above. *See also Schriro v. Summerlin*, 124 S. Ct. 2519, 2522-23 (2004).

ORDER

1. The Petition for Post-Conviction Relief is denied in all respects.

2. The Motionfor Correction of Sentence is denied.

Dated: Sept. 24 ,2004

/s/: Marilyn Brown Rosenbaum
Marilyn Brown Rosenbaum
Judge of District Court

STATE OF MINNESOTA
IN COURT OF APPEALS
A04-1993

STEPHEN DANFORTH, petitioner,
Appellant,

vs.

STATE OF MINNESOTA,
Respondent.

Filed July 26, 2005
Affirmed

Forsberg, Judge *

Hennepin County District Court
File No. 95074990

Stephen Danforth, #147636, 970 Pickett Street North, Bayport, MN 55003-1490 (pro se appellant)

Mike Hatch, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 551012134; and

Amy Klobuchar, Hennepin County Attorney, Michael K. Walz, Assistant Hennepin County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Randall, Presiding Judge, Kalitowski, Judge, and Forsberg, Judge.

SYLLABUS

Because the rule set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), is not a watershed rule of criminal procedure that implicates the fairness and accuracy

of a criminal proceeding, the case does not apply retroactively.

OPINION

FORSBERG, Judge

Appellant moved for postconviction relief under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The district court denied his motion, and he appeals from that denial.

FACTS

At the trial of appellant Stephen Danforth in 1996, the jury was shown a videotaped interview of a child victim who had been ruled unavailable to testify and whom appellant had never had the opportunity to cross-examine. The jury found appellant guilty of first-degree criminal sexual conduct. His conviction became final[1] on July 28, 1999, when the supreme court denied review of this court's decision affirming appellant's sentence on remand. *State v. Danforth*, No. C5-98-2054 (Minn. App. May 4, 1999), *review denied* (Minn. July 28, 1999).

In 2004, the Supreme Court released *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1374 (2004) (holding that testimonial hearsay is inadmissible unless declarant is unavailable and defendant had prior opportunity to cross-examine declarant). Appellant moved for postconviction relief on the ground that *Crawford* invalidates his conviction. The district court denied his motion, and he appeals.[2]

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[1] See *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004) (conviction is final when "judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied").

[2] Appellant also moved for resentencing on the ground that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), applies retroactively. The district court denied the motion. Because appellant's argument was

ISSUE

Does *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), apply retroactively?

ANALYSIS

This court reviews the issue of retroactive application de novo. *State v. Petschl*, 692 N.W. 2d 463, 470 (Minn. App. 2004) (citing *State v. Costello*, 646 N.W. 2d 204, 207 (Minn. 2002)), *review denied* (Minn. Jan. 20, 2005). The retroactive application of *Crawford* is a case of first impression in Minnesota.[3]

Retroactivity with regard to cases on collateral review is governed by *Teague v. Lane*, which sets forth two exceptions to the general principle that defendants whose convictions are final at the time a new rule of law is announced may not avail themselves of the new rule. 489 U.S. 288, 310-12, 109 S. Ct. 1060, 1075-76 (1989). The two exceptions are cases that place particular kinds of conduct beyond the proscriptive power of lawmaking authority and cases that set out "watershed" rules of criminal procedure. Id. at 311-12, 109 S. Ct. at 1075-76. Five of the six federal circuit courts that have considered the retroactive application of *Crawford* in light of Teague have held that *Crawford* does not apply retroactively: *Murillo v. Frank*, 402 F.3d 786, 789-90 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Mungo v.*

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explicitly rejected in State v. Petschl, 692 N.W.2d 463, 472 (Minn. App. 2004) (holding that Blakely "is not a watershed rule subject to retroactive application on collateral review"), review denied (Minn. Jan. 20, 2005),we affirm that denial.

[3] We note that, in light of Crawford, appellant was granted permission to move for reconsideration of the federal district court's determination that his Confrontation Clause rights were not violated by admitting at trial the videotaped interview of the child. See Danforth v. Crist, 2004 WL 1630830 (D. Minn. July 14, 2004), reconsideration granted in part by 2005 WL 1041491 *2 (D. Minn. Mar. 18, 2005). At filing time, federal action remains pending.

Duncan, 393 F.3d 327, 336 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1936 (2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir. 2004); *Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 902 (2005). We find the analyses in these cases persuasive.

Murillo concluded "that Crawford establishes a new rule" but held that the rule was not "a fundamental rule essential to a fair and accurate trial." 402 F.3d 790. *Murillo* provided two reasons for that holding. First, *Crawford* gives defendants the right to insist on live testimony even when available hearsay is trustworthy and "is not an indispensable innocence-protecting decision" that would apply retroactively. *Id.* at 790-91. Second, a violation of the Confrontation Clause, unlike a violation of "a truly vital rule of criminal procedure, such as entitlement to counsel," is subject to a harmless-error analysis; therefore, "*Crawford* cannot have established the sort of indispensable doctrine that applies retroactively even to closed cases." *Id.* at 791.

Dorchy cited *Teague* for the proposition that "[u]nder most circumstances . . . newly promulgated rules of criminal procedure do not apply retroactively to cases on collateral review" and concluded simply that "*Teague* thus prohibits [the defendant] from availing himself of the new rule articulated in *Crawford*." *Dorchy*, 398 F.3d at 788.

Mungo noted that, because *Crawford* will bar both "unreliable" and "highly reliable testimonial out-of-court statements," it will both "improve . . . [and] impair the accuracy of the factfinding process." *Mungo*, 393 F.3d at 335-36. "Because *Teague's* test of a watershed rule requires improvement in the accuracy of the trial process overall, we conclude that *Crawford* is not a watershed rule." *Id.* at 336.

Brown concluded that because *Crawford* "merely sets out new standards for the admission of certain kinds of hearsay" and because "Confrontation Clause violations are subject to

harmless error analysis and thus may be excused . . . [i]t would . . . be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process." *Brown*, 381 F.3d at 1226-27.

Finally, *Evans* found that *Crawford* would not apply retroactively because "the *Crawford* court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to Teague v. Lane 's non-retroactivity doctrine." *Evans*, 371 F.3d at 444; *see also Ferguson v. Roper*, 400 F.3d 635, 639 n.3 (8th Cir. 2005) (citing *Evans* for proposition that *Crawford* doctrine does not fall within *Teague* exceptions).

Only the ninth circuit, in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), *amended by* 408 F.3d 1127 (9th Cir. 2005), has held that *Crawford* applies retroactively. We find this opinion unpersuasive, as did the seventh circuit, which stated:

> The three judges in *Bockting* wrote separately. [One judge] concluded that *Crawford* applies on collateral review because it did not change the law. [Another judge] concluded that *Crawford* did change the law, and changed it so dramatically that it established a "watershed rule" that applies retroactively. [A third judge] agreed . . . that *Crawford* changed the law but . . . saw [it] as an ordinary development in criminal procedure that like almost all other such changes applies prospectively.

Murillo, 402 F.3d at 789-90; *see also Ferguson*, 400 F.3d at 639 n.3 (citing *Hiracheta v. Attorney Gen. of Cal.*, 105 F. App. 937, 938 (9th Cir. 2004), for proposition that *Crawford* is not retroactive).

Thus, the weight of authority from the six circuits that have addressed the issue clearly supports the view that *Crawford* does not have a retroactive application.

DECISION

In light of holdings that Crawforddoes not apply retroactively from the second, sixth, seventh, eighth, and tenth circuits, we conclude that the district court correctly denied appellant's motion for postconviction relief.

Affirmed.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

STATE OF MINNESOTA
IN SUPREME COURT
Court of Appeals
A04-1993

STEPHEN DANFORTH, petitioner,
Appellant,

vs.

STATE OF MINNESOTA,
Respondent.

Filed: July 27, 2006
Office of Appellate Courts

SYLLABUS

1. As stated in *State v. Houston,* 702 N.W.2d 268, 270 (Minn. 2005), this court applies the framework of *Teague v. Lane,* 489 U.S. 288 (1989), when determining the extent of retroactive application of a decision of the United States Supreme Court announcing a rule of federal constitutional criminal procedure.

2. *Crawford v. Washington,* 541 U.S. 36 (2004), established a new rule of federal constitutional criminal procedure that is not within either exception to the general rule of *Teague.* Consequently, appellant, whose case was final at the time *Crawford* was decided, is not entitled to have *Crawford* applied retroactively to his case.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

ANDERSON, G. Barry, Justice.

Stephen Danforth was convicted of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (2004), on March 6, 1996. This conviction arose out of the sexual abuse of J.S., a 6-year-old boy. J.S. was found incompetent to testify at trial, but a videotaped interview of J.S. conducted at a non-profit center was admitted into evidence. On appeal, the court of appeals affirmed Danforth's conviction but remanded for resentencing. *State v. Danforth*, 573 [1] N.W.2d 369, 371 (Minn. App. 1997) *(Danforth I), rev. denied* (Minn. Feb. 19, 1998).[1] On remand, Danforth was sentenced to imprisonment for 316 months. The court of appeals affirmed this sentence on appeal. *State v. Danforth*, No. C5-98-2054, 1999 WL 262143, at *1 (Minn. App. May 4, 1999) *(Danforth II), rev. denied* (Minn. July 28, 1999). Alleging various trial errors, Danforth filed a petition for postconviction relief. The postconviction court denied the petition and the court of appeals affirmed. *Danforth v. State*, No. C6-00-699, 2000 WL 1780244, at *1 (Minn. App. Dec. 5, 2000) *(Danforth III), rev. denied* (Mimi. Feb. 13, 2001).

After the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004),and *Blakely v. Washington*, 542 U.S. 296 (2004), Danforth filed a second petition for postconviction relief alleging he was entitled to relief based on the rules established by those cases. The postconviction court denied Danforth relief, finding that neither *Crawford* nor *Blakely* applied retroactively to Danforth's case; the court of appeals affirmed. *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. App. 2005) *(Danforth IV)*. We granted review of the *Crawford* issue only and requested that the Office of the State Public Defender represent Danforth on this appeal.

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[1] *Danforth I* provides a full statement of the facts of this case. *See* 573 N.W.2d at 371-72.

Danforth argues that this court is free to apply a broader retroactivity standard than that of *Teague v. Lane*, 489 U.S. 288 (1989), and that he is entitled to the benefit of *Crawford* under *state* retroactivity principles. He also argues that, even using the framework of *Teague*, *Crawford* should be retroactively applied to his case. We reaffirm our holding in *State v. Houston*, 702 N.W.2d 268, 270 (Minn. 2005), that we are required to apply *Teague's* principles when analyzing the retroactivity of a rule of federal constitutional criminal procedure. Because we conclude that, under *Teague*, *Crawford* does not apply retroactively to Danforth's case, we affirm.

I.

We recently held that the retroactivity principles of *Teague* control when determining the retroactive effect of a federal constitutional rule of criminal procedure.[2] *Houston*, 702 N.W.2d at 270. Under *Teague*, a new rule is usually not retroactively applicable to a defendant's case once the defendant's case has become final. *Teague*, 489 U.S. at 310 (plurality opinion).[3] It is undisputed that Danforth's case was final before *Crawford* was decided.[4]

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[2] The parties do not dispute that the rule in *Crawford* is one of federal constitutional procedure, and *Crawford* states as much. *See* 541 U.S. at 67 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.").

[3] While *Teague's* retroactivity analysis originally received only a plurality, it soon became the majority approach and continues to be cited by the Supreme Court. *See Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (adopting *Teague* analysis as majority approach), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Beard v. Banks*, 542 U.S. 406, 408 (2004) (applying *Teague*).

[4] "A case is final when a 'judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari [has been filed and] finally denied." *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004) (alterations in the original) (quoting *Griffith v. Kentucky*, 479 U.S. 314,

For the first time in his brief to this court, Danforth argues that this court is free to apply a broader retroactivity standard than that in *Teague* and that he is entitled to the benefit of *Crawford* under stateretroactivity principles. We choose to address this issue in the interests of justice.

We have stated that, when dealing with a new rule of federal constitutional criminal procedure, we are "compelled to follow the lead of the Supreme Court in determining when a decision is to be afforded retroactive treatment." *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004). This conclusion is based on *American Trucking Associations, Inc. v. Smith*, in which a plurality of the Supreme Court stated that the retroactive effect of its federal constitutional decisions is a question of federal law and that the Court has "consistently required that state courts adhere to [the Court's] retroactivity decisions." 496 U.S. 167, 177-78 (1990) (plurality opinion); *see also*

Ashland Oil, Inc. v. Caryl, 497 U.S. 916, 918 (1990). In *Houston*, we applied *O'Meara's* principles to hold that we *must* follow the *Teague* framework when determining whether a postconviction petitioner is entitled to have a new rule of federal constitutional criminal procedure applied retroactively to his or her case. *Houston*, *702* N.W.2d at 270. Minnesota is not the only state to have determined that a *Teague* analysis is required when determining whether a new rule of federal constitutional criminal procedure can be applied retroactively to cases on state postconviction review. *See Page v. Palmateer*, 84 P.3d 133, 134-38 (Or. 2004).

Danforth argues that *Teague* dictates the limits of retroactive application of new rules only in *federal* habeas corpus proceedings and does not limit the retroactive application of new rules in *state* postconviction proceedings. Danforth is incorrect when he asserts that state courts are free to give a Su-

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321 n.6 (1987)).

preme Court decision of federal constitutional criminal procedurebroader retroactive application than that given by the Supreme Court. In *American Trucking Associations*, the plurality rested its retroactivity analysis in part on *Michigan v. Payne*, 412 U.S. 47 (1973). *Am. Trucking Ass'ns, Inc.*, 496 U.S. at 178. In *Payne*, the Court reversed the decision of the Michigan Supreme Court, which had applied *North Carolina v. Pearce*, 395 U.S. 711 (1969), retroactively to Payne's case, and held that *Pearce* would not apply to errors occurring before *Pearce* was decided. *Payne*, 412 U.S. 49, 57.

In light of *Payne* and *American Trucking Associations*, we cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles. While the Supreme Court has not explicitly addressed retroactivity principles instatepostconvictionproceedings, the Court has drawn a line between cases that are "pending on direct review," and cases that are "final." *See Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) ("When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still *pending on direct review. As to convictions that are already final*, however, the rule applies only in limited circumstances." (citation omitted) (emphasis added)). Once a case is "final," a new rule of federal constitutional criminal procedure can be retroactively applied to the case only if retroactive application is warranted under the *Teague* framework. *Schriro*, 542 U.S. at 351-52. The Court, therefore, has created a retroactivity framework with only two procedural categories of cases: (1) those on direct review and (2) those that are final. Since we have already concluded that a petition for postconviction relief does not constitute "direct review," *see Houston*, 702 N.W.2d at 270, and it is undisputed that Danforth's case was final at the time of the *Crawford* decision, we must apply *Teague* when determining whether *Crawford* can be retroactively applied to Danforth's case.

We are aware that other states have declined to apply *Teague* or have emphasized that they apply *Teague* as a matter of choice when determining the retroactivity of new rules of federal constitutional criminal procedure in state postconviction proceedings. *See Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296-97 (La. 1992); *State v. Whitfield*, 107 S.W.3d 253, 266-68 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 470-71 (Nev. 2002); *Cowell v. Leapley*, 458 N.W.2d 514, 517-18 (S.D. 1990). The principal rationales given in these decisions are: (1) a state may give a new rule of federal constitutional criminal procedure greater retroactive effect than that given by the Supreme Court and (2) state postconviction proceedings involve different interests than federal habeas proceedings. *See Whitfield*, 107 S.W.3d at 267-68; *Colwell*, 59 P.3d at 470-71; *Cowell*, 458 N.W.2d at 517-18. *Teague's* framework is based, in part, on concerns unique to federal habeas corpus decisions. *See Teague*, 489 U.S. at 308 ("KW]e have recognized that interests of *comity* and finality must also be considered in determining the proper scope of habeas review." (emphasis added)). Notwithstanding these different policy concerns, in light of *Payne*, *American Trucking Associations*, and the dichotomy drawn by *Teague* between cases on "direct review" and "final" cases, we reaffirm our decision in *Houston and* conclude that we are not free to fashion our own standard of retroactivity for *Crawford*. Therefore, the retroactivity of *Crawford* to Danforth's case must be analyzed under *Teague*.

II.

Danforth argues that, even using a *Teague* analysis, *Crawford* applies retroactively to his case because: (1) *Crawford* did not announce a "new" rule and, alternatively, (2) *Crawford* established a "watershed rule" of criminal procedure and therefore is fully retroactive under an exception to *Teague's* general rule. Whether *Crawford* applies retroac-

tively to cases final at the time *Crawford* was decided is a purely legal issue reviewed de novo. *See Houston,* 702 N.W.2d at 270. We address each of Danforth's arguments in turn.

A.

Under *Teague,* we inquire "whether the rule of federal constitutional criminal procedure is new, or whether it is merely a predictable extension of a pre-existing doctrine." *Houston,* 702 N.W.2d at 270. If the rule is "new," it generally will not be applicable to cases that became final before the rule was announced. *Teague,* 489 U.S. at 310. Danforth argues that *Crawford* did not announce a new rule of constitutional procedure but that Crawford'sdecision was "dictated by precedent dating back to the 1800s." The state, citing the decisions of several federal circuit courts on this issue, argues that holding that *Crawford* established a new rule is the better-reasoned position.

Crawford's "holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not *dictated* by precedent existing at the time the defendant's conviction became final." *See Graham v. Collins,* 506 U.S. 461, 467 (1993) (quoting *Teague,* 489 U.S. at 301). *Teague's* limit on the retroactivity of new rules of constitutional procedure "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar,* 494 U.S. 407, 414 (1990). As we have stated, the test to determine whether a rule of procedure is "new" for *Teague* purposes is not whether the rule "is logically an extension of some precedent," but rather "whether 'reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* by existing precedent to rule in his favor." *Houston,* 702 N.W.2d at 271 (quoting *Graham,* 506 U.S. at 467) (emphasis added) (internal quotation omitted)).

This test is meant "to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith,* 497 U.S. 227, 234 (1990).

Applying these principles to this case,we examine the change *Crawford* worked on the legal landscape. As we have stated, prior to *Crawford,* the admissibility of an out-of-court statement under the Confrontation Clause was guided by *Ohio v. Roberts,* 448 U.S. 56 (1980), *abrogated by Crawford,* 541 U.S. 36. *See State v. Bobadilla,* 709 N.W.2d 243, 248 (Minn. 2006). Under *Roberts,* a hearsay statement could be admitted without violating a defendant's rights under the Confrontation Clause if: (1) the declarant was unavailable at trial and(2) the statement bore "adequate indicia of reliability." 448 U.S. at 66. Sufficient reliability was inferred when the evidence fell "within a firmly rooted hearsay exception." *Id.* If the evidence did not fall within such an exception, it was only admissible upon "a showing of particularized guarantees of trustworthiness." *Id.*

Crawford "significantly altered the rules governing the admissibility of testimonial out-of-court statements against criminal defendants at trial." *Wright,* 701 N.W.2d at 808. Stating that the *Roberts* test had a "demonstrated capacity" to admit statements in contravention of the Confrontation Clause, the Supreme Court held that "testimonial" evidence is inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *See Crawford,* 541 U.S. at 53-54, 63, 68. The Court declined to provide a complete definition of "testimonial," but stated that the term covered, "at a minimum, * * prior testimony at a preliminary hearing, before a grand jury, or at a former trial[,] and * * police interrogations." *Id.* at 68.

The rule in *Crawford,* therefore,was not compelled by *Roberts—Crawford* replaced the more flexible reliability inquiry of *Roberts* with a bright-line rule for a certain class of

hearsay statements. Nonetheless, Danforth argues that *Crawford* did not announce a new rule because "the Supreme Court has always held that testimonial statements made without cross-examination were inadmissible under the Confrontation Clause." This argument rests on the fact that *Crawford* based its rule on the "Framers' understanding" of the Confrontation Clause, *see* 541 U.S. at 59, 68, and the Court's statement that "the results of our Kprior] decisions have generally been faithful to the original meaning of the Confrontation Clause," *id.* at 60.

Danforth's argument is flawed because it misconstrues the test governing whether a rule is new for *Teague* purposes. We do not ask whether *Crawford's* rule is faithful to the original meaning of the Confrontation Clause or whether the results of relevant Supreme Court precedent are consistent with the rule in *Crawford.* Instead, we ask "whether reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* by existing precedent to rule in his favor.'" *Houston,* 702 N.W.2d at 271 (quoting *Graham,* 506 U.S. at 467 (emphasis added) (internal quotation omitted)). As noted earlier, prior to *Crawford, Roberts* guided a court's inquiry concerning whether the admission of an out-of-court statement violated the Confrontation Clause. *Bobadilla,* 709 N.W.2d at 248; *see also State v. King,* 622 N.W.2d 800, 807 (Minn. 2001). Put another way, Danforth's argument requires "reasonable jurists" to have foreseen *Crawford's significant* modification—if not outright overruling—of *Roberts.*[5] When conducting an analysis under *Teague,* the Supreme Court has never required such prescience of lower courts. Furthermore, such a requirement

[5] Danforth does not provide any examples of such "reasonable jurists." *Crawford* cited numerous lower court decisions (including the decisions of four federal circuits) which had recently applied *Roberts* to admit "plainly testimonial statements despite the absence of any opportunity to cross-examine." *See Crawford,* 541 U.S. at 64-65.

would not "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414. Consequently, *Crawford* established a new rule of federal constitutional criminal procedure for the purposes of *Teague*.[6]

B.

There are two exceptions to *Teague's* general rule that new rules of federal constitutional criminal procedure are not retroactively applicable to cases that were final when that new rule was announced. *Teague*, 489 U.S. at 311. The first exception establishes that *Teague's* "bar does not apply to rules forbidding punishment 'of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' *Beard v. Banks*, 542 U.S. 406, 416 (2004) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). The second exception, which is "known as the 'watershed rule' exception, applies when the new rule 'requires the observance of those procedures that * * are implicit in the concept of ordered liberty' or 'alter our understanding of the *bedrock procedural elements* that must

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[6] As noted by the state and court of appeals, this conclusion is in accordance with that of most federal circuits that have addressed this issue. Of the six circuits that have clearly addressed this issue, five have unquestionably held that *Crawford* established a new rule. *See Espy v. Massac*, 443 F.3d 1362, 1366 (11th Cir. 2006); *Lave v. Dretke*, 444 F.3d 333, 335 (5th Cir. 2006), *petition for cert. filed*, U.S.L.W. (U.S. June 13, 2005) (No. 05-11552); *Bintz v. Bertrand*, 403 F.3d 859, 865-67 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 174 (2005); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1226 (10th Cir. 2004), *cert. denied*, 543 U.S. 1079 (2005). Even the Ninth Circuit, the only circuit thus far to hold that *Crawford* applies retroactively under *Teague*, held *Crawford* to be retroactive on the basis of one of the exceptions to *Teague's* general rule. *See Bockting v. Bayer*, 399 F.3d 1010, 1016, 1021 (9th Cir. 2005), *opinion amended on denial of panel reh'g*, 408 F.3d 1127 (9th Cir. 2005), *cert. granted sub nom. Wharton v. Bockting*, 126 S. Ct. 2017 (2006).

be found to vitiate the fairness of any particular conviction.' *Houston*, 702 N.W.2d at 270-71 (quoting *Teague*, 489 U.S. at 311). Danforth argues that, if *Crawford* established a new rule for *Teague* purposes, the rule is a "watershed rule" within *Teague's* second exception. The state argues, and the court of appeals held, that the rule established by *Crawford* does not fall within this narrow exception. *Danforth IV*, 700 N.W.2d at 531-32.

Since the Supreme Court adopted the *Teague* framework, it has yet to find a new rule of federal constitutional criminal procedure that qualifies as a "watershed rule." Such a rule "must be one without which 'the likelihood of an accurate conviction is seriously diminished.' *Houston*, 702 N.W.2d at 273 (quoting *Teague*, 489 U.S. at 313). A watershed rule must do more than simply improve the accuracy of a proceeding; it must be "essential to fundamental fairness of a proceeding." *Id.* The only rule that the Supreme Court has stated would fall within this exception is the right to trial counsel established by *Gideon v. Wainright*, 372 U.S. 335 (1963). *Beard*, 542 U.S. at 417. These rules are extremely rare, and the Supreme Court recently stated that it is unlikely any watershed rules have yet to be announced. *Schriro*, 542 U.S. at 352.

The rule announced in *Crawford* cannot meet the stringent requirements of this exception. First, *Crawford* imposed a bright line rule of exclusion for a certain class of hearsay statements based on the original intent of the Confrontation Clause. *See* 541 U.S. at 59, 68. Even when dealing with a fundamental right, the appropriate inquiry under *Teague* is not whether the new rule reflects the framers' intent, but whether jurisprudence under the "old rule" seriously diminished the accuracy of a criminal proceeding. *See Schriro*, 542 U.S. at 355-56. Given that, prior to Crawford,Confrontation Clause jurisprudence focused on the reliability of out-of-court statements, *see Roberts*, 448 U.S. at 66, the likelihood of

obtaining an accurate conviction is not seriously diminished in the absence of the rule established by *Crawford*. Indeed, the Supreme Court has indicated that some new rules of criminal procedure, though constitutionally based, may actually decrease the likelihood of an accurate determination of guilt or innocence. *See Butler*, 494 U.S. at 411, 416 (stating that a *violation* of the procedural rule in *Arizona v. Roberson*, 486 U.S. 675 (1988), may *increase* the likelihood of an accurate determination of guilt or innocence). The same argument could be made here, for while in some cases a *Crawford* violation would decrease the likelihood of an accurate determination of guilt or innocence (i.e., admitting an unreliable statement), in other cases statements admissible under the *Roberts* test but excluded under the *Crawford* test would be highly reliable and helpful to the jury's determination. While the additional protections of *Crawford* effectuate the original meaning of the Sixth Amendment, the absence of *Crawford's* bright line rule would not "seriously diminish the likelihood of obtaining an accurate determination" of innocence or guilt. *See Butler*, 494 U.S. at 416.

Similarly, the Supreme Court has also looked at pre-existing protections for defendants when examining whether a new procedural rule is an "absolute prerequisite to fundamental fairness' as required by *Teague's* second exception. *See Sawyer*, 497 U.S. at 243-44 (quoting *Teague*, 489 U.S. at 314). Given the pre-existing Confrontation Clause protections for defendants under *Roberts*, *Crawford's* rule is not "essential to the fundamental fairness of a proceeding." *Houston*, 702 N.W.2d at 273.

For all of the above reasons, the rule established by *Crawford* does not qualify as a "watershed rule" for the purposes of *Teague's* second exception.[7] Therefore, *Crawford*

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[7] Again, this is in accordance with the conclusion reached by most federal circuits that have addressed this issue. *See Espy*, 443 F.3d at 1367; *Lave*, 444 F.3d at 336; *Bintz*, 403 F.3d at 867; *Dorchy*, 398 F.3d at 788;

established a new rule of federal constitutional criminal procedure that is not within one of *Teague's* exceptions and, given that Danforth's case was final at the time of the *Crawford* decision, Danforth cannot receive the retroactive application of *Crawford* to his case.

Affirmed.

Mungo v. Duncan, 393 F.3d 327, 335-36 (2d Cir. 2004), *cert. denied*, 544 U.S. 1002 (2005); *Brown*, 381 F.3d at 1226-27. Only one circuit has held otherwise. *See Bockting*, 399 F.3d at 1021.

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(12) JUL 19, 2007

No. 06-8273

IN THE
Supreme Court of the United States

STEPHEN DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Minnesota

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?

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IN THE

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No. 06-8273

STEPHEN DANFORTH,
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v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Minnesota

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is published at 718 N.W.2d 451 (Minn. 2006). It appears at pages 42-54 of the joint appendix. The opinion of the Minnesota Court of Appeals is published at 700 N.W.2d 530 (Minn. Ct. App. 2005). It appears at pages 36-41of the joint appendix. The district court's order denying the petition for post-conviction relief is unpublished. It appears at pages 31-35 of the joint appendix.

JURISDICTION

The Minnesota Supreme Court issued its decision on July 27, 2006, and entered final judgment on the appeal on October 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2006).

CONSTITUTIONAL PROVISIONS

U S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Minnesota Supreme Court held that this Court had precluded it from applying a new rule of federal constitutional criminal procedure on state post-conviction review. The Minnesota Supreme Court was wrong, and this Court should reverse its decision.

Petitioner Stephen Danforth was convicted by a jury in Minneapolis, Hennepin County, Minnesota, of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (1994), on March 6, 1996. JA 5. The conviction arose out of the alleged sexual abuse of J.S., a six-year-old boy. *Id.* The district court judge found that J.S. was incompetent to testify

at petitioner's trial. JA 7. In lieu of J.S.'s live testimony which would have been subject to cross-examination, the jury saw and heard a videotaped interview of J.S. conducted by staff at a "non-profit center." *Id.* During the interview, J.S. accused petitioner of sexually abusing him. *Id.*

Petitioner appealed his conviction. Among other claims, he argued that the admission of the videotape of J.S.'s statement violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. JA 13. The Minnesota Court of Appeals considered the issue under the balancing test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), and attendant United States Supreme Court and Minnesota caselaw. JA 14-15. The court of appeals affirmed the admission of the tape and the conviction, holding that "the videotape was sufficiently reliable to be admitted into evidence." JA 14. The Minnesota Supreme Court denied review and, following a second direct appeal after a resentencing, petitioner's case became final in 1999.[1] JA 30.

In 2004, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court "impose[d] an absolute bar to [the admission of] statements that are testimonial, absent a prior opportunity to cross-examine [the declarant]." *Crawford*, 541 U.S. at 61. Believing that J.S.'s statement was testimonial and thus was admitted in violation of his right of confrontation, petitioner, acting pro se, filed a petition for post-conviction relief to challenge his conviction.[2] The district court, the Honorable Marilyn Brown Rosenbaum,

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[1] In 2000, petitioner filed his first petition for post-conviction relief challenging his conviction and sentence. The petition was denied and it is not at issue here. *See Danforth v. State*, 2000 WL 1780244 (Minn. Ct. App. 2000), *rev. denied* (Minn. Feb. 13, 2001) (attached in appendix to petition for writ of certiorari at E-1 – E-5).

[2] Petitioner also challenged his sentence under *Blakely v. Washington*, 542 U.S. 297 (2004). The Minnesota courts denied that claim and it is not before this Court now.

denied the petition. JA 31-35. The district court used the standard first announced in *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality), to determine if *Crawford* applied to petitioner's case. JA 35, ¶ 4. The court concluded that *Crawford* "announced a new rule of law not dictated by precedent at the time Petitioner's conviction became final" and thus did not apply to petitioner's case.[3] *Id.* Petitioner appealed and the Minnesota Court of Appeals affirmed. JA 36-41. Petitioner petitioned for further review before the Minnesota Supreme Court. The court granted the petition on "the *Crawford* issue only," JA 43, and assigned petitioner counsel.

Petitioner made two arguments to the Minnesota Supreme Court. First, he argued that *Crawford* applied to his case under *Teague*. The Minnesota court rejected this claim and it is not before this Court now. JA 47-54. Second, he argued that the Minnesota court was "free to apply a broader retroactivity standard than that of *Teague*. . ., and that he is entitled to the benefit of *Crawford* under *state* retroactivity principles." JA 45. (emphasis original; *see Danforth*, 718 N.W.2d at 455). The Minnesota court rejected this claim as well. The court held that petitioner "is incorrect when he asserts that state courts are free to give a [United States] Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court." JA 45-46. Relying primarily upon *American Trucking Ass'n v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion), and *Michigan v. Payne*, 412 U.S. 47, 49 (1973), the Minnesota court held that it "cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal princi-

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[3] The district court erroneously concluded that petitioner's case became final in 1998. The mistake is irrelevant, as petitioner's conviction became final before this Court decided *Crawford*.

ples." JA 45-46. The court recognized that several other state supreme courts had reached the opposite conclusion and noted that the policy concerns underlying the *Teague* rule may not apply to state post-conviction proceedings. JA 47. But ultimately, the court held that it was "not free to fashion [its] own standard of retroactivity for *Crawford*." *Id.*

This Court granted certiorari to decide whether state courts are required to use the *Teague* standard to determine the retroactive effect of this Court's decisions. The Court should now hold that the state courts are not so constrained.

SUMMARY OF THE ARGUMENT

State supreme courts are not required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal convictions. This Court adopted the *Teague* standard to solve a specific problem: the anomaly created when a federal court upsets a state-court conviction on the basis of constitutional commands not in force when the state-court conviction became final. As such, the *Teague* rule is a procedural defense that may be invoked by States as parties to federal habeas corpus litigation. It is not a limitation on the power of the courts of the several States.

The Minnesota Supreme Court's misstep in this case came when it confused cases setting a constitutionally-mandated retroactivity floor – i.e., cases describing the minimum requirements of federal law – with some sort of constitutionally-mandated ceiling on state-court authority. The Federal Constitution sets floors, not ceilings, regarding retroactive application of new rules of federal constitutional criminal procedure. Basic norms of constitutional adjudication require state courts to apply new rules of constitutional criminal procedure to all cases pending on direct review when the rule is announced. The Constitution requires nothing else. But

neither the Constitution nor non-constitutional federal law prohibits state courts or state legislatures from opening a forum for that state's prisoners to challenge their convictions under all currently applicable constitutional rules, if a State chooses to do so.

The Court did not intend to require state courts to use the *Teague* standard. Nor could the Court have imposed such a requirement, as no possible source of authority for the *Teague* rule could be used to place a limit on the actions of state courts. Were this Court now to impose upon the States the burden of following the *Teague* rule, it would not only be turning established concepts of federalism upside down but would be upsetting the States' historical freedoms to provide greater substantive and procedural protections to their respective citizens than those afforded in federal court. This Court must reverse the Minnesota Supreme Court, reaffirm the long-held understanding of our federalism, and confirm that States are free to grant to their citizens more protections under state law than those citizens are entitled to under federal law.

ARGUMENT

I. TEAGUE WAS INTENDED TO SOLVE A SPECIFIC PROBLEM: FEDERAL COURT INTERFERENCE WITH STATE CRIMINAL CONVICTIONS. IT WAS NOT INTENDED TO, AND DOES NOT, BIND STATE COURTS IN STATE POST-CONVICTION PROCEEDINGS.

A. *Teague* Applies Only To Federal Courts Reviewing State-Court Convictions On Federal Habeas Review.

The *Teague* standard governs only federal courts sitting in habeas corpus review of state-court criminal convictions. Federal courts are empowered to entertain a petition for a writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court" if the person alleges that he

or she "is in custody in violation of the [federal] Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (2006). Since Congress first provided federal courts with this authority, the Supreme Court "has grappled with the relationship between the classical common-law writ of habeas corpus and the remedy provided in [the habeas statute]." *Wainwright v. Sykes*, 433 U.S. 72, 78 (1977); *see also Fay v. Noia*, 372 U.S. 391, 415-26 (1963) (detailing history of federal habeas review of state-court convictions under statute). In the last two decades, this Court has promulgated several restrictions on the federal courts' authority to upset state-court criminal convictions on habeas review. *See Sykes*, 433 U.S. at 77-82 (detailing different prudential doctrines limiting or expanding availability of habeas relief).

In *Teague*, a plurality of this Court announced the most significant such restriction.[4] *Teague* announced two bright-line rules: subject to two extremely narrow exceptions, federal courts reviewing state-court convictions on habeas corpus review would no longer be permitted to 1) announce new rules of constitutional criminal procedure; or 2) apply a new rule to a case that had become final before the new rule was announced. *Teague*, 489 U.S. at 310. The plurality reached its decision by focusing not upon the nature of the constitutional right at stake or the extent of the alleged constitutional violation, but rather "on the nature, function, and scope of the adjudicatory process in which such cases arrive." *Id.* at 306 (quotation omitted). That "adjudicatory process" was federal habeas corpus review of state-court convictions, and the proper focus was upon "the purposes for which the writ of habeas corpus is made available." *Id.* The

[4] Justice O'Connor's opinion for the Court in *Teague* was a plurality opinion. The *Teague* rule, however, was quickly adopted by a majority of the Court and has been used since. *See Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (majority adopts *Teague* standard), *abrogated in part on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Citations to *Teague* in this brief are to the plurality opinion unless otherwise indicated.

issue in *Teague* was "not so much one of prospectivity or retroactivity of [a new constitutional] rule," but rather was a policy choice: to define which state prisoners could obtain "'federal habeas corpus [review] to go behind [an] otherwise final judgment of conviction'" based upon new rules of procedure. *Id.* at 309-10 (quoting Paul J. Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 77-78 (1965)).

In forming that policy, the plurality focused on two key interests: comity and finality. *Teague*, 489 U.S. at 308. The Court was concerned about the "costs imposed upon the State[s] by retroactive applications of new rules of constitutional law on habeas corpus[.]" *Id.* at 310 (quotation omitted). The plurality determined that those costs "far outweigh the benefits of [required retroactive] application" of new rules. *Id.* Such required application "*continually* forces" the States to defend otherwise final judgments against habeas attacks in federal court. *Id.* (emphasis original). Ultimately, the plurality decided that "[a]pplication of constitutional rules [that were] not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309; *see also Reed v. Ross*, 468 U.S. 1, 21 (1984) (Rehnquist, J., dissenting) (discussing the "anomal[y]" created when a federal habeas court upsets a state criminal conviction "because of legal developments that occurred long after the [state-court] conviction became final.").

The *Teague* rule was based largely upon Justice Harlan's policy positions on the retroactive application of new rules to federal habeas cases. *Teague*, 489 U.S. at 305-14 (discussing, inter alia, *Mackey, et al. v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in judgments in part and dissenting in part); and *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting)). Justice Harlan believed that all new rules had to be applied to cases pending on direct

review when the rule was announced, *see Desist*, 394 U.S. at 257 (Harlan, J., dissenting), but that federal courts, acting on habeas review, should not apply such rules to cases that had already become final. *See Mackey*, 401 U.S. at 683, 688-89 (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 U.S. at 260-62 (Harlan, J., dissenting). Justice Harlan based these specific positions upon his general view that the Constitution did not "[a]ssur[e] every state and federal prisoner a forum in which he can continually litigate the current constitutional validity of the basis for his conviction." *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in part and dissenting in part).

Teague, and the decisions upon which it was based, were focused exclusively upon one forum: habeas corpus review by federal courts of state-court criminal convictions. *See Teague*, 489 U.S. at 292 (describing state prisoner's federal habeas claim); *Id.* at 305-14; *Mackey*, 401 U.S. at 682 n. 1 (Harlan, J., concurring in part and dissenting in part) (framing discussion as involving prisoners seeking federal habeas review of their convictions); *Id.* at 682-89 (discussing "the purposes for which the [federal] writ of habeas corpus is made available"); *Desist*, 394 U.S. at 260-62 (Harlan, J., dissenting) (discussing "Retroactivity on Habeas Corpus"). Nothing in *Teague* indicates that the rule it announced was intended to bind any courts other than federal courts sitting in habeas review of state-court convictions.[5] And while Justice Harlan did not believe that the Constitution guaranteed state prisoners a forum in which they could challenge their convictions on the basis of new rules of procedure, he did not discuss, or discount, the possibility that the States might choose to create such a forum.

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[5] One dissent pointed out as much. *Teague*, 489 U.S. at 328 (Brennan, J., dissenting) (commenting that decision appeared to apply only to specific fact scenario of state prisoner challenging state conviction in federal court).

This Court has repeatedly emphasized the limited nature of *Teague's* holding by commenting that it concerns only the specific fact scenario there presented: federal habeas review of state-court convictions. Three years after authoring the opinion that announced the test, Justice O'Connor described *Teague's* limited application: "*Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring); *see also Beard v. Banks*, 542 U.S. 406, 412 (2004) (*Banks II*) ("*Teague's* nonretroactivity principle acts as a limitation on the power of *federal* courts to grant habeas corpus relief to ... state prisoner[s]") (quotation omitted) (alteration original) (emphasis added); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("The *Teague* doctrine embodies certain special concerns – related to collateral review of state criminal convictions [by federal courts] – that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances."); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("The nonretroactivity principle prevents a *federal* court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final.") (emphasis altered) (citation omitted); *Stringer v. Black*, 503 U.S. 222, 227-28 (1992) ("When a petitioner seeks *federal* habeas relief based upon a principle announced after a final judgment, *Teague* and [its progeny] require a *federal* court to answer an initial question, and in some cases a second.") (emphasis added). In sum,

> [t]he *Teague* cases reflect this Court's view that *habeas corpus* is not to be used as a second criminal trial, and *federal* courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals.

Williams v. Taylor, 529 U.S. 362, 383 (2000) (op. of Stevens, J.) (emphasis added).

The *Teague* rule was based upon the purpose and scope of "the adjudicatory process in which [*Teague*] ar[ose]." *Teague*, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 682) (Harlan, J., concurring in part and dissenting in part)). That "adjudicatory process" was federal habeas corpus review of state-court criminal convictions, not state-court post-conviction review of that state's criminal convictions. The two processes are entirely different, and state courts are not required to use the *Teague* standard when reviewing their own criminal convictions.

B. The Cases Interpreting *Teague's* "New Rule" Requirement Make Clear that *Teague* Controls Federal, not State, Courts.

The cases interpreting *Teague's* "new rule" requirement strongly indicate that *Teague* binds only federal courts when those courts consider creating or applying a new rule of constitutional criminal procedure in a habeas review of a state-court conviction. Out of respect for decision-making by state-court judges, the Court has greatly expanded the definition of a "new rule" that would be inapplicable on habeas review. The Court has explained this expansion by stating that it "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[6] *Butler v. McKeller*, 494 U.S. 407, 414 (1990); *see also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *West*, 505 U.S. at 291 (op. of Thomas, J.); *Stringer*, 503 U.S. at 227. Thus, a decision will be treated as "new" even if it was "controlled" or "governed" by prior law. *Butler*, 494 U.S. at 415. A rule will only be considered "old" if, at the time it was decided, "*no other* interpretation

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[6] Whether this statement is one of "policy" or of "law," it stands for the proposition that federal courts are "not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams*, 529 U.S. at 382-83 (op. of Stevens, J.).

[of precedent] was reasonable." *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997) (emphasis original). This standard is necessary, the Court has reasoned, to "protect[]...the reasonable judgments of state courts." *Banks II*, 542 U.S. at 413. This policy of deference – to either the conviction generally, *see Williams*, 529 U.S. at 383 (op. of Stevens, J.) or to the legal question specifically, *see West*, 505 U.S. at 294 (op. of Thomas, J.) – dates back to *Teague's* emphasis on comity. *See Teague*, 489 U.S. at 310.

When this Court decided *Teague*, it made clear that it was reluctant to allow federal-court judges to second-guess state-court decision-making on the basis of constitutional rules that were not in place at the time of the state-court proceeding. *Teague*, 489 U.S. at 309. The Court recognized that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.'" *Teague*, 489 U.S. at 310 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n. 33 (1982) (alterations in original)). *Teague* prohibited such second guessing when the outcome of a particular decision was "susceptible to debate among reasonable minds." *Butler*, 494 U.S. at 415. In that circumstance, *Teague* requires the federal court to give way to the original state-court decision. But this rationale applies only to federal courts sitting in judgment of state-court convictions. It has no application when the state-court decision at issue is being reviewed by a higher court in the same state.

C. *Teague* Comes From a Source of Authority that Can Bind Only Federal Courts.

This Court has never explicitly stated from which source of its authority it drew the *Teague* rule. But there are only two possible sources of authority for *Teague*, and neither of them may force the state courts to apply a particular retroactivity test.

The *Teague* rule could have resulted from this Court's interpretation of the federal habeas corpus statute, 28 U.S.C. § 2254. A state prisoner's right to obtain federal court review of his state-court conviction is premised upon section 2254, and *Teague* itself involved a section 2254 petition.[7] *Teague*, 489 U.S. at 293; *see also Mackey*, 401 U.S. at 687-88 (Harlan, J., concurring in part and dissenting in part); *Noia*, 372 U.S. at 409-410, 415-26 (explaining history of habeas statute and availability of federal habeas relief for state prisoners). Or, *Teague* could have come from an exercise of this Court's supervisory powers over the federal courts. *See United States v. Hasting*, 461 U.S. 499, 505 (1983) (holding that this Court has the authority to "within limits[] formulate procedural rules not specifically required by the Constitution or the Congress" that bind all federal courts). *Teague* was, in the end, a policy decision, and this Court can use its supervisory powers to make such policies. *See Teague*, 489 U.S. at 310 (discussing policy-driven basis for decision); *Mackey*, 401 U.S. at 682-83, 688-89, 691 (Harlan, J., concurring in part and dissenting in part) (discussing application of new rules to habeas cases as policy decisions); *see also Butler*, 494 U.S. at 413-14 (comparing *Teague* to policy-based good-faith exception to Fourth Amendment's probable-cause warrant requirement) (citing *United States v. Leon*, 468 U.S. 897, 918-19 (1984)).[8]

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[7] Justice Brennan, for one, apparently saw *Teague* as a statutory-interpretation decision, albeit, in his view, an incorrect one. *See Butler*, 494 U.S. at 417-28 (Brennan, J., dissenting); *Teague*, 489 U.S. at 332-33, 339 (Brennan, J., dissenting).

[8] *Butler*'s comparison of *Teague* to *Leon* is an apt one. The rules announced in each case represent choices made by the Court in its role as policy-maker for the federal courts. *See Leon*, 468 U.S. at 913, 922 (discussing policy reasons behind the good-faith exception). But state courts are free to make different policy decisions regarding the good-faith exception, *see, e.g., State v. Novembrino*, 519 A.2d 820, 853-57 (N.J. 1987) (rejecting good-faith exception), and they are similarly free to make

But from whichever source of authority sprang the *Teague* rule, state courts are not compelled to follow it. State courts review state-court convictions on collateral attack under authority granted to them by their respective legislatures, not under the federal habeas statute. *See Cowell v. Leapley*, 458 N.W.2d 514, 517 (S.D. 1990) (emphasizing that collateral review in South Dakota state court is conducted pursuant to state statute, over which state supreme court exercises final interpretive authority). Indeed, section 2254 does not discuss state courts at all. 28 U.S.C. § 2254(a) (2006).

This case, for example, concerns petitioner's request for relief in Minnesota state court under Minnesota's Post-Conviction Relief Act, Minn. Stat. §§ 590.01 – 590.09 (2004).[9] That statute allows a Minnesota state-court judge to make any "disposition as may be appropriate" to resolve the case, including granting the petitioner a new trial. Minn. Stat. § 590.01, subd. 1. If the Minnesota Supreme Court interprets that language to allow for retroactive application of new rules of procedure to otherwise final cases, its decision would be the authoritative and final interpretation of the statute. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). The same is true for state post-conviction statutes that authorize retroactive application of new rules "in the interests of justice." Colo. Rev. Stat. § 18-1-410(f)(I) (West 2004); N.D. Cent. Code § 29-32.1-01(1)(f) (2005).[10] It is for the courts of

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different policy decisions regarding application of new rules to otherwise final cases.

[9] For a discussion of the history and purposes of Minnesota's Post-Conviction Relief Act, see *Deegan v. State*, 711 N.W.2d 89, 93-95 (Minn. 2006).

[10] The Colorado Supreme Court has chosen, as a matter of state public policy, to adopt the *Teague* rule. *Edwards v. People*, 129 P.3d 977, 981-83 (Col. 2006), *cert. denied*, 127 S.Ct. 1483 (2007). The North Dakota Supreme Court has not fully considered the issue of whether it is required to use the *Teague* standard. *See, e.g., Clark v. State*, 621 N.W.2d 576, 577-79 (N.D. 2001) (declining to decide whether state court was required to use *Teague*).

those states, not the federal courts, to determine when "the interests of justice" require retroactive application of new rules of constitutional criminal procedure.

Furthermore, "[i]t is beyond dispute that [this Court] do[es] not hold a supervisory power over the courts of the several States." *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2679 (2006) (quoting and citing *Dickerson v. United States*, 530 U.S. 428, 438 (2000); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension")). State courts are not compelled to follow the holdings of supervisory-powers decisions including, if premised upon supervisory authority, *Teague*. *See Early v. Packer*, 537 U.S. 3, 10 (2003) (*per curiam*).

If *Teague* were a constitutional command to all courts, as the Minnesota Supreme Court concluded it was, then one would think that this Court would have relied upon some constitutional provision in promulgating the *Teague* rule. But it did not. *See Teague*, 489 U.S. at 299-316. This is because *Teague* was not a constitutional decision. *Cf. Lowenfield v. Phelps*, 484 U.S. 231, 239 n. 2 (1988) (holding that decision in *Jenkins v. United States*, 380 U.S. 445 (1965), was based upon exercise of supervisory powers, not interpretation of the Constitution, based in part upon fact that "[t]he *Jenkins* Court cited no provision of the Constitution" in support of its holding). As such, state courts are not compelled to follow it. *See Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) ("[I]n state courts. . . [Supreme Court] authority is limited to enforcing the commands of the United States Constitution."). The Court announced and enforces the *Teague* rule pursuant to a source of authority which does not and cannot limit the actions of the courts of the several States.

D. *Teague* Is a Prudential Doctrine that May Be Raised by the State as a Party to Federal Habeas Corpus Litigation, Not a Constitutional Command to All Courts.

The Minnesota Supreme Court apparently believed that *Teague* announced some sort of constitutionally-based command to that court, and all other state courts, dictating what rules of law could be applied to which cases. *Teague* did nothing of the sort. The *Teague* rule is simply a procedural defense that can be raised by the State as a party to federal habeas litigation. If the State chooses to so invoke the *Teague* rule, the federal court must consider the defense, even if a state court has considered the merits of the prisoner's challenge. *Horn v. Banks*, 536 U.S. 266, 272 (2002) (*per curiam*) (*Banks I*). But if the State chooses not to rely upon *Teague* and instead to meet the merits of a prisoner's constitutional arguments head-on, the federal court may honor that decision as well. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (so holding and contrasting Eleventh Amendment-based defense which "need not be raised [to be] decided by the Court on its own motion") (citing *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 515 n. 19 (1982)).

More to the point, as with any procedural defense, a State may give up the right to have federal courts consider the *Teague* rule by default. A State may forfeit consideration of *Teague* by silence, *see Parke v. Raley*, 506 U.S. 20, 26 (1992), or by attempting to claim the protections of the *Teague* rule in an untimely manner, *see Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (state waived *Teague* by not raising it in opposition to petition for writ of certiorari); *Godinez v. Moran*, 509 U.S. 389, 397 n. 8 (1993) (state waived *Teague* by raising defense for first time in petition for certiorari). If the *Teague* rule truly limited the authority of state courts to hear and consider the merits of federal constitutional claims,

one would not think that it could be so easily surrendered by States as parties to litigation.

E. Conclusion.

The *Teague* rule, which came from an interpretation of the federal habeas statute or from this Court's exercise of its supervisory powers over lower federal courts, applies only to cases involving the adjudicatory process in which *Teague* arose: federal habeas corpus review of state court criminal convictions. In such cases, *Teague* provides a prudential defense available to States as parties to federal habeas corpus litigation. The rule was designed, and has been enforced, to protect the reasonable judgments of state courts. But the prudential, procedural rule announced in *Teague* is not a limitation upon the power of the courts of the several States. The Minnesota Supreme Court erred by concluding that it was, and this Court should now hold that it is not.

II. *TEAGUE* DOES NOT SET THE MAXIMUM PROTECTION THAT STATE COURTS CAN OFFER STATE CRIMINAL DEFENDANTS BECAUSE THIS COURT'S RETROACTIVITY PRECEDENTS SET CONSTITUTIONALLY MANDATED FLOORS BELOW WHICH STATE COURTS MAY NOT DESCEND, NOT CEILINGS ABOVE WHICH STATES MAY NOT ASCEND.

A. The Constitution Sets a Floor, Not a Ceiling, Concerning the Need for Retroactive Application of this Court's Decisions.

This Court's retroactivity cases set floors below which state courts may not descend, not ceilings above which they may not ascend, in applying this Court's decisions to otherwise final cases. Long before *Teague*, this Court made clear that state courts are free to apply federal law to a broader

class of defendants than the class defined by federal retroactivity standards. In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court held that the then-prevailing retroactivity standards did not require state courts to apply *Escobedo v. Illinois*, 378 U.S. 478 (1964) or *Miranda v. Arizona*, 384 U.S. 436 (1966), to cases pending on state collateral review. *Johnson*, 384 U.S. at 721, 731-33. Federal law required application of *Escobedo and Miranda* only to cases initiated after those decisions were announced. *Johnson*, 384 U.S. at 733. But the Court made plain that "States are still entirely free to effectuate under their own law stricter standards than those we have laid down and *to apply those standards in a broader range of cases than is required by this decision.*" *Id.* (emphasis added). This is all petitioner seeks. The Minnesota Supreme Court erred by ignoring – not even citing, let alone discussing – *Johnson*.

The Court set the retroactivity floor in *Griffith v. Kentucky*, 479 U.S. 314 (1987). There, the Court held that all courts, state and federal, had to apply constitutional new rules to all cases pending on direct review when the rule is announced. *Griffith*, 479 U.S. at 322. In so holding, the Court retreated from its earlier pronouncement that "the Constitution neither prohibits nor requires retrospective effect of a new constitutional rule." *Id.* at 320 (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)). The Court instead recognized that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322; *see also Teague*, 489 U.S. at 317 (White, J., concurring in part and concurring in the judgment) (commenting that *Griffith* "appear[s] to have constitutional underpinnings") (citation omitted). The "norms" were defendants' rights to due process and the requirement of "treating similarly situated [parties] the same." *Id.* at 322-23; *see also Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 95 (1993) (discussing rationales behind *Griffith*).

But *Griffith* set the floor, not the ceiling. It held that state courts must apply new rules to all pending cases. *See, e.g., O'Meara v. State*, 679 N.W.2d 334, 339-40 (Minn. 2004). It did not hold that "a state cannot apply new criminal procedural rules to cases on collateral review." *State v. Whitfield*, 107 S.W.3d 253, 266 (Mo. 2003) (emphasis original). State courts certainly may not "limit" retroactive application of federal law in violation of federal retroactivity standards because doing so would violate the "basic norms of constitutional adjudication" upon which *Griffith* was based. *Harper*, 509 U.S. at 100. But States are not prohibited from applying those rules to an even broader class of cases if they choose to do so. *Johnson*, 384 U.S. at 733.

Teague, like *Griffith*, sets retroactivity "floors" which States are obliged to follow. Holdings which place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part), and holdings which establish "watershed rules" that "implicate the fundamental fairness of the trial," *Teague*, 489 U.S. at 312, must be applied retroactively to all cases, final and pending. State courts must apply such holdings retroactively because, as with applying new rules to cases on direct review, not doing so would violate "components of basic due process." *Teague*, 489 U.S. at 313. State courts are obliged to meet these retroactivity floors. Nothing else is required by the Constitution or by federal law, but the States are not prohibited from applying other types of rules retroactively, if they choose to do so.

B. The Minnesota Supreme Court Confused this Court's Precedent Dealing with Retroactivity Floors — Decisions Detailing the Minimum Requirements of Federal Law — With Decisions Setting Retroactivity Ceilings.

The Minnesota Supreme Court's wrong turn in this case came when it misconstrued cases dealing with floors – cases in which this Court set forth the minimum requirements of federal retroactivity law – as somehow supporting the proposition that *Teague* had set a constitutional ceiling with respect to retroactive application of new rules of constitutional criminal procedure.

The primary case that the court misinterpreted was *American Trucking Ass'ns., v. Smith*, 496 U.S. 167 (1990). JA 45-47. In *American Trucking*, this Court considered whether the Arkansas Supreme Court had misapplied the then-applicable federal test for determining retroactive application of civil cases. *American Trucking*, 496 U.S. at 174-75 (plurality). Three years earlier, in *American Trucking Assn's., Inc. v. Scheiner*, 483 U.S. 266, 284 (1987), the Court had declared unconstitutional certain types of highway taxes. Following that decision, the Arkansas Supreme Court considered whether *Scheiner* applied retroactively or, stated another way, whether *Scheiner* required Arkansas to refund all taxes collected under the now-unconstitutional scheme, even those collected before *Scheiner* was released. *American Trucking*, 496 U.S. at 173-76 (plurality); *see also Id.* at 205-06 (Stevens, J., dissenting). The Arkansas Supreme Court considered the question under the then-applicable federal retroactivity standards and concluded that it did not. *American Trucking*, 496 U.S. at 174-76 (plurality). Therefore, the state court declined to afford relief to state taxpayers who had paid the unconstitutional tax before *Scheiner* invalidated it. *Id.*

On grant of certiorari, this Court first considered whether it had jurisdiction to hear the case. *Id.* at 177 (plurality). The plurality held that when a state court uses federal law to decide that a United States Supreme Court decision does not apply retroactively, thus depriving some of the citizens of that state of the benefits of the decision at issue, the question presented – "does the decision at issue apply retroactively?" – is one of federal law which this Court has jurisdiction to answer. *Id.* The question of whether a state court *must* apply a United States Supreme Court decision retroactively also "is a matter of federal law." *Id.* The plurality went on to hold that, under the federal standard, *Scheiner* was not fully retroactive and thus federal law did not require the State to provide relief to all taxpayers burdened by the tax. *Id.* at 182-83 (plurality). But, again considering the issue under federal law, the Court held that *Scheiner* was partially retroactive and that, therefore, the State had to provide relief to taxpayers who paid the unconstitutional tax at issue after *Scheiner* was announced. *Id.* at 186-87 (plurality).

The Minnesota Supreme Court confused *American Trucking's* discussion of a federally-mandated floor with a federally-mandated ceiling. Federal retroactivity standards are necessary "to prevent States from *denying* or *curtailing* federally protected rights." *Id.* at 178 (plurality) (emphasis added). Therefore, "federal law sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Id.* at 178-79 (plurality). While Arkansas was required by federal law to provide some relief to taxpayers *only* for taxes collected after *Scheiner* was announced, nothing precluded Arkansas from "exceed[ing]" that requirement, thereby granting even greater retroactive application of *Scheiner*.[11] *Id.* As long as the federal

[11] Writing in dissent, and also commanding four votes, Justice Stevens was even more emphatic in defense of that State's right to afford relief broader than that required under federal law. "[T]he Federal

minimum is satisfied, States may, but are not required to, provide relief that exceeds that minimum. *Id.* at 178-79.

The other cases that the Minnesota Supreme Court relied upon are equally distinguishable. In *Ashland Oil v. Caryl*, 497 U.S. 916 (1990) (per curiam), this Court considered the West Virginia Supreme Court's holding that *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), "which invalidated the West Virginia tax scheme that had. . . been applied against Ashland [Oil] as discriminatory against interstate commerce," did not apply retroactively under state law. *Ashland Oil*, 497 U.S. at 917. This Court reversed because federal law required the state court to apply *Hardesty* retroactively. *Id.* at 918-21. The West Virginia court erred in *Ashland Oil* because, by refusing to apply *Hardesty* retroactively, it violated the floor set by federal retroactivity rules. *Id.*

That is not the situation here. If, for example, this Court held that a particular decision applied retroactively under *Teague*, and a state court purported to rely upon state law to refuse to undertake such application, *Ashland Oil* would be authority for this Court to reverse such a decision. *Id.; see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) (op. of Souter, J.) (holding that state court erred by refusing to apply retroactively a Supreme Court decision where federal law required such application); *Yates v. Aiken*, 484 U.S. 211, 217-18 (1988) (rejecting argument that state court could refuse to apply a decision retroactively where federal law required retroactive application); *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) (*per curiam*) (reversing state conviction because federal law required retroactive application of right-to-counsel cases). But *Ashland Oil* does not discuss, let alone limit, the state's authority to afford

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Constitution," he wrote, "does not ordinarily limit the State's power to give a decision remedial effect greater than that which a federal court would provide." *American Trucking*, 496 U.S. at 210 (Stevens, J., dissenting).

broader retroactive application of United States Supreme Court decision than federal law requires.

The Minnesota Supreme Court also misread *Michigan v. Payne*, 412 U.S. 47 (1973). JA 46-47. In *Payne*, the Michigan Supreme Court ruled that it was probably required, under federal law, to apply this Court's holding in *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969), to Payne's case, which was pending on direct review when *Pearce* was announced. *Payne*, 412 U.S. at 49 (citations omitted). The state court relied upon what it guessed federal law required and expressly invited this Court to correct it if it was wrong. *Id.* This Court did so and held that, under the then-applicable balancing test, the state court did not have to apply *Pearce* to Payne's case. *Id.*

But this Court did *not* hold that the Michigan Supreme Court could not apply *Pearce* to Payne's case. Thus, the question presented here was not at issue in *Payne*. Instead, the only question in *Payne* was whether the Michigan Supreme Court was required to apply *Pearce* retroactively. Stated another way, the question was whether this Court would "impose[]" the "burden[]" of retroactive application of *Pearce* upon Michigan and the other States. *Payne*, 412 U.S. at 57; *see also American Trucking*, 496 U.S. at 210 n. 4 (Stevens, J., dissenting) ("*Payne* does not stand for the expansive proposition that federal law limits the relief a State may provide, but only for the more narrow proposition that a state court's decision that a particular remedy is constitutionally required is itself a federal question."). The Michigan court chose to use the federal retroactivity standard and this Court simply ruled on what the federal standard required.[12]

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[12] In addition, *Payne*'s precedential effect is lessened in the post-*Griffith* world. Payne's case was pending on direct review when *Pearce* was announced and therefore, presumably, he would be entitled to the benefit of *Pearce* if the situation replayed itself today.

When it comes to retroactive application of United States Supreme Court decisions, federal law sets floors, not ceilings. This Court should reverse the Minnesota Supreme Court's decision, which erroneously confused the two.

III. STATE COURTS ARE FREE TO COME TO DIFFERENT POLICY CONCLUSIONS REGARDING THE INTERESTS AT STAKE IN COLLATERAL REVIEW OF CRIMINAL CONVICTIONS.

In setting and enforcing the *Teague* standard, this Court made a policy decision. But nothing stops the state courts from making different policy decisions after balancing the interests at stake: stated generally, the interests of finality against the interests of affording full review of the merits of important federal constitutional claims. Where disagreement exists about how best to accomplish a particular goal, such as the best way to balance the interests of finality and full adjudication of constitutional claims, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citations omitted).[13] *See* Mary C. Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 Ala. L. Rev. 421, 445-58 (1995) (describing differing policy concerns between state and federal courts regarding collateral review of state convictions). Several States have, in fact, done just that.

The South Dakota Supreme Court, for example, determined that the *Teague* standard was "unduly narrow" and that its own retroactivity standard "adequately restrict[ed] what

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[13] A state is "freer" to revel in this role once it have been "disabused of its erroneous view of what the United States Constitution requires." *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (citation omitted).

decisions may be reviewed." *Cowell*, 458 N.W.2d at 518; *see also Smart v. State*, 146 P.3d 15, 46-47 (Alaska Ct. App. 2006) (Mannheimer, J., concurring) (arguing that state courts can and should use a broader retroactivity test because *Teague* is so "limited" in what claims it will allow and "[s]tate courts must. . .be free to do justice in situations where a new rule should, in fairness, be applied retroactively"), *rev. granted* (Alaska 2006).

The Nevada Supreme Court recognized that "the need to prevent excessive interference [with state criminal convictions] by federal habeas courts[,]" *Teague's* comity-based primary animating concern, "has no application to habeas review by state courts [of state court convictions]." *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002).[14] The Nevada court also decided that the state's interest in the finality of a conviction was lessened when state courts review state convictions because any decision would only apply within the State and because state collateral review (at least in Nevada) generally occurs relatively quickly. *Colwell*, 59 P.3d at 471. Finally, the Nevada court concluded that it wished to "encourage[]...[the] perspicacious, reasonable application of constitutional principles in cases where no precedent appears to be squarely on point," a policy that it felt could best be achieved by using a broader retroactivity standard. *Id.*

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[14] As one Alaska state-court judge put it:

> 'Federal-state comity' is a polite way of referring to the goal of avoiding the political difficulties that can be created when the federal government exercises authority over matters that might reasonably be viewed as being primarily state concerns. This goal has no bearing on the question of whether a state supreme court should grant or withhold retroactive application of new constitutional rules to defendants who were prosecuted and convicted under that state's law.

Smart v. State, 146 P.3d at 45 (Mannheimer, J., concurring).

Similarly, the Missouri Supreme Court determined that its concerns about finality "are well protected by" a broader retroactivity standard, the one it had "traditionally applied." *Whitfield*, 107 S.W.3d at 267. That standard "comports better with Missouri's legal tradition." *Id.* at 268; *see also* Hon. Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 Val. U. L. Rev. 421, 438-49 (2004) (discussing *Whitfield* and arguing that States are free to use retroactivity standards other than *Teague* to afford retroactive application of United States Supreme Court decisions to a broader class of defendants than the class defined by *Teague*).

Other state supreme courts have chosen, for their own policy reasons, to adopt the *Teague* standard. *See, e.g., State v. Slemmer*, 823 P.2d 41, 49 (Az. 1991); *People v. Flowers*, 561 N.E.2d 674, 682 (Ill. 1990). Still others have formulated hybrid forms of *Teague*, using its basic structure while reserving for themselves the right to apply new rules to a broader class of cases, or to a particular case, if the need arises or the interests of justice so require. *See State v. Forbes*, 119 P.3d 144, 147-48 (N.M. 2005), *cert. denied*, 127 S.Ct 1482 (2007) (using combination of *Teague* framework and equity considerations to apply *Crawford* to a case that became final in 1985); *Colwell*, 59 P.3d at 471-72 (announcing a retroactivity standard that uses *Teague* as a model but with different guidelines for determining whether a rule is new); *see also* Colo. Rev. Stat. § 18-1-410(f)(I) (West 2004); N.D. Cent. Code 29-32.1-01(1)(f) (2005) (allowing state post-conviction courts to retroactively apply of new rules of procedure "in the interests of justice").

These States' consideration, acceptance, rejection, or modification of the *Teague* standard for state-court collateral review is a prime example of how our federalism works. States, as sovereigns, are free to make their own policy choices after balancing interests of finality against those of

full adjudication of constitutional claims. State courts must provide at least as extensive retroactive application of new *rules of* federal constitutional rules as do federal courts. *Griffith*, 479 U.S. at 322. But as long as States do not drop below the floor set by federal law, nothing should stop the States from using any retroactivity standard that they see fit.

Indeed, state courts may properly come to a different conclusion than did this Court about the policy benefits of applying *Crawford v. Washington*, 541 U.S. 36 (2004), to cases on collateral review. Federal courts may not apply *Crawford* on habeas review of state-court convictions that were final before *Crawford* was announced. *Whorton v. Bockting*, 127 S.Ct. 1173, 1184 (2007). Under *Teague*, it would be improper for a federal court to second-guess a state-court judge who did not anticipate that this Court would "overrule[]" *Ohio v. Roberts*, 448 U.S. 56 (1980), "the prior governing precedent." *Bockting*, 127 S.Ct. at 1181. But there is nothing unconstitutional or illegal about state courts reviewing their own convictions and choosing, in the interests of justice, to reach a different conclusion.

At least one State has already done so. In 1985, the New Mexico Supreme Court ordered a new trial for Ralph Earnest because of a Confrontation Clause violation, relying upon "the very rationale" embraced twenty years later in *Crawford*.[15] *Forbes*, 119 P.3d at 145 (citing *State v. Earnest*, 703 P.2d 872, 876 (1985) (*Earnest I*)).[16] This Court reversed and

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[15] The trial judge had admitted Earnest's co-defendant's hearsay statements to police. The New Mexico Supreme Court reversed because the statements were made to a law-enforcement officer and Earnest did not have the opportunity to cross-examine the declarant. *State v. Earnest*, 703 P.2d 872, 876 (N.M. 1985) (*Earnest I*).

[16] Apparently because the New Mexico Supreme Court received the 2006 case on a pre-decision appeal, it is styled as the State of New Mexico versus the Honorable Jay W. Forbes, the presiding district court judge. *See Forbes*, 119 P.3d at 145. Ralph Rodney Earnest, the original

ordered the New Mexico courts to apply a different Confrontation Clause test, one that resulted in the state court affirming Earnest's conviction.[17] *Forbes*, 119 P.3d at 145 (citations omitted). Following the release of *Crawford*, which seemed to confirm that the New Mexico court's original decision had been correct, Earnest filed a state habeas corpus petition challenging his convictions. *Id.*

Emphasizing the "unique circumstances" and the "unique facts and procedural posture of Earnest's case," the New Mexico Supreme Court applied *Crawford* retroactively and reversed his conviction. *Id.* at 145, 147-48. The court reasoned that "[g]ranting Earnest a new trial is consistent with [its] responsibility 'to do justice to each litigant on the merits of his own case.'" *Id.* at 148 (quoting *Desist*, 394 U.S. at 259 (Harlan, J., dissenting)). The court summed up its decision as follows:

> Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then.

Id. at 148-49. This Court denied New Mexico's petition for a writ of certiorari. *New Mexico v. Forbes*, 127 S.Ct. 1482 (2007).

The question presented in this case, essentially, is whether the New Mexico Supreme Court acted in some way illegally. It is unclear, at best, how reversing Earnest's conviction could have been illegal or unconstitutional. The New Mexico

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defendant and the petitioner for a state-court writ of habeas corpus, is the "Real Party in Interest." *Id.* at 144.

[17] This Court's *per curiam* decision remanded the case "for further proceedings not inconsistent with the opinion in *Lee v. Illinois*, 476 U.S. 530 (1986)." *New Mexico v. Earnest*, 477 U.S. 648 (1986) (*per curiam*) (mem).

court made a policy decision and determined that Earnest's interest in full adjudication of his constitutional claims outweighed the State's interest in the finality of Earnest's conviction. In so ruling, the court did not misapply the Federal Constitution. One may dispute whether the New Mexico court made the correct policy decision. But the decision was the New Mexico court's to make. *See Banks II*, 542 U.S. at 412 (noting the "possibility that a state court might, in its discretion, decline to enforce an available procedural bar and choose to apply a new rule of law").

The Minnesota Supreme Court recognized that state post-conviction review involves "different policy concerns" than does federal habeas corpus review of state convictions. JA 47. But the court determined that it could not consider those concerns because this Court had imposed upon the States a "uniform national requirement," to borrow Justice Harlan's phrase, that state courts may not apply new rules of constitutional criminal procedure to state-court cases that had become final. *Chapman v. California*, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting)[18]; JA 47. Justice Harlan did not believe in the imposition of such restrictions. To do so "would destroy that opportunity for broad experimentation which is the genius of our federal system." *Chapman*, 386 U.S. at 48 (Harlan, J., dissenting). His concerns are well-

[18] Justice Harlan dissented in *Chapman* because he perceived its holding (that a state court may not dismiss as harmless federal constitutional error unless that error is harmless beyond a reasonable doubt) as emanating from some kind of "general supervisory power" over the state courts, which this Court does not have. *Chapman*, 386 U.S. at 46-47. However, this Court has made clear in subsequent cases that the *Chapman* rule is constitutionally based, not based upon an exercise of some kind of supervisory power. *See Fry v. Pliler*, 127 S.Ct. 2321, 2326 (2007) (noting that "state courts are required to apply *Chapman*" and that state courts have a "duty to apply *Chapman*"); *see also Dickerson*, 530 U.S. at 438 (holding that Court may only reverse state-court convictions when those convictions were imposed in violation of the Federal Constitution).

taken. Any command to the state courts to apply *Teague* would amount to "a radical shift of authority from the States to the Federal Government" and would upset "the federal-state balance" that our federalism is designed to protect. *Gonzales v. Oregon*, 546 U.S. 243, ___, 126 S.Ct. 904, 925 (2006).

This Court is free to promulgate and enforce procedural rules for federal courts. But "'[f]ederal judges...may not require the observance of any special procedures' in state courts 'except when necessary to assure compliance with the dictates of the Federal Constitution.'" *Dickerson*, 530 U.S. at 438-39 (quoting *Harris v. Rivera*, 454 U.S. 339, 344-45 (1981) (*per curiam*)); *see also Chapman*, 386 U.S. at 21 (noting that Court may only impose upon the States those "authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights."). "States are quite capable" of enacting their own procedural limitations on collateral review of state convictions if they feel the need to strictly protect the finality of their criminal convictions. *Johnson v. United States*, 544 U.S. 295, 312 (2005) (Kennedy, J., dissenting). *See, e.g.*, Minn. Stat. § 590.01, subd. 4(a) (Supp. 2005) (providing for two-year time limit on filing of post-conviction petitions).[19] But States may differ with each other, or with the federal government, "as to the appropriate resolution of the values they find at stake" in this area. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). For example, this Court took no constitutional issue with a State's decision to allow collateral attacks upon a conviction for an "indefinite[]" period of time. *Johnson*, 544

[19] The Minnesota Legislature amended the Post-Conviction Relief Act to provide for the two-year time limit in 2005, after petitioner filed the post-conviction petition at issue here. 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098. All defendants whose convictions became final before August 1, 2005, were given two years from that date to file post-conviction petitions. *Id.*

U.S. at 306, 306 n. 6. So long as States respect the minimum requirements of federal retroactivity law, the decision of which new rules apply to which set of cases in a particular state is a decision for that State's courts and legislature to make. *See Colwell*, 59 P.3d at 471. This is how our federalism works.

The Federal Constitution does not "[a]ssur[e]" state prisoners of "a forum" in which they may challenge their otherwise final convictions based upon new rules of constitutional criminal procedure. *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in part and dissenting in part). But the Constitution also does not prevent States from establishing such a forum. The Minnesota Supreme Court's decision to the contrary must be reversed.

IV. IMPOSING THE *TEAGUE* RULE UPON STATE COURTS WOULD TURN THE ESTABLISHED NOTION OF FEDERALISM ON ITS HEAD AND WOULD VIOLATE THE STATE COURTS' HISTORICAL FREEDOM TO GRANT MORE PROTECTION TO THEIR CITIZENS THAN THOSE AFFORDED BY THE FEDERAL GOVERNMENT.

Under our federal system, the courts of the sovereign States may interpret their respective laws to afford broader protections to their citizens than the protections afforded by the Federal Constitution or federal law. The Constitution recognizes the States as "sovereign entities." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n. 15 (1996). The States, not the federal government, "possess primary authority for defining and enforcing the criminal law." *Isaac*, 456 U.S. at 128. Therefore, "[i]t is fundamental that state courts be left free and unfettered by [the Supreme Court] in interpreting their state constitutions," so that they might best decide how to carry out that responsibility. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Indeed, the States' authority in this area

is not limited to interpretations of state constitutions. States may "adopt by statute, rule, or decision," *Iowa v. Tovar*, 541 U.S. 77, 94 (2004), or by simple promulgation of state "public policy," *Nichols v. United States*, 511 U.S. 738, 749 n. 12 (1994), any standard that offers greater protections to their respective citizens than those offered by federal law.

Similarly, and key to this case, is the state courts' authority to afford greater procedural protections to their respective citizens, even where the state court is applying substantive federal law. State courts may apply Supreme Court cases announcing new rules to "a broader range of cases" than those required under federal law. *Johnson*, 384 U.S. at 733; *see also Banks II*, 542 U.S. at 412 (*citing Sykes*, 433 U.S. at 81-91); *Wichita Royalty Co., et al. v. City Nat. Bank of Wichita Falls*, 306 U.S. 103, 109 (1939) ("nothing requires the state court to adopt the [procedural] rule which the federal or other courts may believe to be the better one"). Indeed, a state court usually does not have an obligation to consider *any* "preliminary nonmerits issue," such as *Teague*, and may choose instead "to bypass the preliminary issue and rest its decision on the merits" of a prisoner's claim. *Smith v. Texas*, 127 S.Ct. 1686, 1703 (2007) (Alito, J., dissenting). For example, an unpreserved Sixth Amendment error under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), is reviewable in federal court only for plain error. *United States v. Cotton*, 535 U.S. 625, 631-34 (2002). But a state court may choose to bypass the nonmerits plain-error test and instead consider on their merits unpreserved Sixth Amendment errors. *See State v. Osborne*, 715 N.W.2d 436, 444-46 (Minn. 2006).

State courts or state legislatures may allow litigants to bring claims asserting a violation of federal law in state courts even where those litigants would not be able to bring the same claim in federal court. In *ASARCO, Inc. v. Kandish*, 490 U.S. 605 (1989), for example, the Court considered

whether it had jurisdiction to review an Arizona state-court decision in a lawsuit brought by parties who, had the suit been filed in federal court, would not have had standing.[20] *ASARCO*, 490 U.S. at 613-17 (op. of Kennedy, J.); *Id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part). The original plaintiffs had standing to sue in Arizona state court, however, under Arizona's taxpayer-standing laws. *Id.* at 612, 617. The Court held that Arizona was free to "[take] no account of federal standing rules" and could afford standing to pursue federal claims in state court to a bigger group of litigants than federal law required. *Id.* at 617. "[E]ven when they address issues of federal law, as when they are called upon to interpret the Constitution or...a federal statute," states are free to grant standing to litigants who would not have such rights in federal court. *Id.*

The Court recognized the "paradox" that this result created; namely, that plaintiffs proceeding in state court could obtain a determination of their rights under federal law "that would have been unavailable if the action had been filed initially in federal court." *Id.* at 624. But to disallow this result would be to "impose federal standing requirements on the state courts whenever they adjudicate issues of federal law. . .[.] That result...would be contrary to established traditions and to [this Court's] prior decisions. . .[.]" *Id.* at 620. In sum, allowing the States to open their courthouse doors to a larger class of litigants than would be so eligible in federal court, even to pursue claims under federal law, is "necessary in deference to the States." *Id.* at 624.[21]

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[20] The original plaintiffs in *ASARCO*, as mere taxpayers, would not have had standing in federal court because Article III does not generally recognize taxpayer standing. *See ASARCO*, 490 U.S. at 613-17 (op. of Kennedy, J.).

[21] Although *ARASCO* produced three opinions, no Justice questioned Arizona's right to grant standing to the original plaintiffs to pursue their federal claims in state court, regardless of whether the same plaintiffs

Teague is similar to *ASARCO* in that both cases concern who, among a group of potential litigants, is entitled to make a substantive federal claim. *See Teague*, 489 U.S. at 309-10 (quoting Mishkin, *The High Court*, 79 Harv. L. Rev. at 77-78). And the federal courts have no more authority to "impose federal...requirements on the state courts" in this arena than they do in the civil arena. *ASARCO*, 490 U.S. at 620. If anything, given state courts' freedom to interpret their own laws or enact their own policies that result in granting more protections to state citizens than those afforded in federal court, the federal courts' authority to require state courts to use the *Teague* rule is even more doubtful than was their authority to impose federal standing requirements upon the States.

Even in the criminal context, state courts may open their doors to litigants who cannot be heard in federal courts to raise federal claims. For example, in capital cases, the Pennsylvania Supreme Court once applied a "relaxed waiver rule," under which that court would consider federal claims that, among other things, would have been *Teague*-barred if pursued via federal habeas. *See Banks II*, 542 U.S. at 411-12 (citing cases and discussing former rule); *Banks I*, 536 U.S. at 269-72. In *Banks I*, this Court held that such a practice does not change the federal habeas court's obligation to conduct a *Teague* analysis if *Teague* was properly raised by the State in a subsequent federal habeas proceeding. *Banks I*, 536 U.S. at 272. And in *Banks II*, this Court held that such a practice does not change the determination of when a case is final for *Teague* purposes in the subsequent federal habeas case. *Banks II*, 542 U.S. at 412. But in neither case did the Court take issue with the practice itself. In other words, this Court had no quarrel with the Pennsylvania Supreme Court's policy decision to ignore *Teague* and to review all claimed legal

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would have had standing in federal court or whether this Court had jurisdiction over the case.

issues, federal or state, in a particular set of cases. To the contrary, the Court expressly recognized that a state court may, in its discretion, "decline to enforce an available procedural bar and choose to apply a new rule of law" to an otherwise final case. *Banks II*, 542 U.S. at 412 (citing *Sykes*, 433 U.S. at 81-91).

States may even enlarge the scope of relief available for a federal constitutional violation when that violation is litigated in state court. In 2005, the Washington Supreme Court held that, as a matter of federal law, a Sixth Amendment error under *Blakely v. Washington*, 542 U.S. 296 (2004), was automatically reversible structural error. *State v. Hughes*, 110 P.3d 192, 208 (Wash. 2005) (relying upon, inter alia, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). This Court subsequently disagreed. *Washington v. Recuenco*, 126 S.Ct. 2546, 2553 (2006). But this Court made clear that Recuenco's "argument that, as a matter of *state* law, the *Blakely*. . . error was not harmless remains open to him on remand." *Recuenco*, 126 S.Ct. at 2551 n. 1 (emphasis original); *see also Id.* at 2554 (Stevens, J., dissenting) (agreeing with majority that "[t]he Washington Supreme Court can, of course, reinstate the same judgment on remand. . . [if] that court chooses, as a matter of state law, to adhere to its view that the proper remedy for *Blakely* errors. . . is automatic reversal of the unconstitutional portion of a defendant's sentence"). Thus, this Court gave the Washington Supreme Court permission to hold that criminal defendants in that state are entitled to something to which criminal defendants in other states or federal court are not entitled – automatic reversal of the portion of their sentences that were imposed in violation of the Federal Constitution. In other words, the Washington Supreme Court could afford defendants in that State a form of relief for a Sixth Amendment error to which no other defendant in the country was entitled.

This, essentially, is what the Minnesota Supreme Court held that federal law prohibited it from doing. JA 46-47. The

Minnesota court held that federal law, i.e., *Teague*, controlled the question of who was entitled to relief under *Crawford* because *Crawford* was a case interpreting the Federal Constitution. *Id.* If that were true, then the Washington courts would not be able to hold that *Blakely* errors are structural under state law; *Blakely* errors, after all, are violations of the Federal Constitution, not the Washington state constitution. If federal law limited state-court authority in this area to the extent that the Minnesota Supreme Court believed it did, Washington would not have the authority recognized in *Recuenco*.

In sum, there is always a "possibility" that a state court may "decline to enforce an available procedural bar[, such as the *Teague* rule,] and choose to apply a new rule of law," to a particular case. *Banks II*, 542 U.S. at 412 (citing *Sykes*, 433 U.S. at 81-91); *see, e.g., Forbes*, 119 P.3d at 147-48. The Minnesota Supreme Court erroneously held that there was no such possibility because it was required to apply the *Teague* procedural bar, whether it wanted to or not. The Minnesota court was wrong, and this Court should hold as much.

V. THIS COURT SHOULD REVERSE THE DECISION OF THE MINNESOTA SUPREME COURT, THEREBY VINDICATING STATE-COURT AUTHORITY AND RETURNING POWER TO THE PEOPLE OF THE SEVERAL STATES.

By confirming that state courts are not required to use the *Teague* rule when considering state post-conviction petitions, but instead may offer broader protections to state prisoners, this Court will "vindicate" state authority to open access to state courts. *Kansas v. Marsh*, 126 S.Ct. 2516, 2531 (2006) (Scalia, J., concurring). By correcting the Minnesota Supreme Court's "federal error[]," this Court will "*return power to the State, and to its people*." *Marsh*, 126 S.Ct. at 2531 (Scalia, J., concurring) (emphasis original). Furthermore, the

Court will allow the state supreme courts to act with their full, robust authority to afford greater protections than federal law requires to the citizens of their respective states. *See Marsh*, 126 S.Ct. at 2541 (Stevens, J., dissenting).

As this Court has long recognized, state courts are, and must remain, "free to interpret state [law] to accord greater protection to individual rights" than are offered in federal court. *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *see also Long*, 463 U.S. at 1041. The best way to encourage States to act as laboratories of individual rights is to "disabuse[] [them] of [their] erroneous view of what the United States Constitution requires." *Evans*, 514 U.S. at 8; *see also Marsh*, 126 S.Ct. at 2531 (Scalia, J., concurring). Petitioner respectfully requests that this Court so disabuse the Minnesota Supreme Court.

CONCLUSION

This Court should reverse the judgment of the Minnesota Supreme Court and remand this case to that court for further proceedings.

Respectfully submitted,

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No. 06-8273

In The Supreme Court of the United States

STEPHEN DANFORTH,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Minnesota

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QUESTION PRESENTED

Are states required to apply this Court's retroactivity doctrine when determining federal constitutional issues in criminal collateral review proceedings?

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Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 Ala. L. Rev. 421 (1993) 18

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The opinion of the Minnesota Court of Appeals affirming Petitioner's conviction on direct review and remanding for resentencing is at pages 4-20 of the Joint Appendix and is published at 573 N.W.2d 369 (Minn. Ct. App. 1997). The opinion of the Minnesota Court of Appeals affirming Petitioner's sentence is at pages 21-29 of the Joint Appendix. The Minnesota Supreme Court's denial of review is at page 30 of the Joint Appendix. The Hennepin County District Court's denial of Petitioner's second petition for postconviction relief is at pages 31-35 of the Joint Appendix. The opinion of the Minnesota Court of Appeals affirming the denial of Petitioner's second petition for postconviction relief is at pages 36-41 of the Joint Appendix and is published at 700 N.W.2d 530 (Minn. Ct. App. 2005). The opinion of the Minnesota Supreme Court affirming the Minnesota Court of Appeals' denial of Petitioner's second petition for postconviction relief is at pages 42-54 of the Joint Appendix and is published at 718 N.W.2d 451 (Minn. 2006).

CONSTITUTIONAL PROVISIONS

Article III sections 1 and 2 of the United States Constitution:

> Section 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a

compensation which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects.

Article VI paragraph 2 of the United States Constitution:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

STATEMENT OF THE CASE

Petitioner is a "multiply-convicted pedophile with an extensive history of sexually abusing young boys during the 1970's and 1980's." *State v. Danforth*, 573 N.W.2d 369, 372 (Minn. Ct. App. 1997). On August 11, 1995, a neighbor

discovered J.S., a six-year-old boy, acting out in a sexual manner. When J.S.'s mother asked where he learned such things, J.S. identified "Steve." *Id.* J.S. participated in a videotaped interview at a non-profit sexual abuse center. *Id.* During the interview, J.S. revealed Petitioner had sexually abused him. *Id.* Petitioner was arrested and charged with first degree criminal sexual conduct. *Id.* Petitioner is a disbarred attorney and represented himself throughout the prosecution. *Id.* At Petitioner's request, the trial court held a competency hearing relating to J.S. *Id.* The trial court found J.S. incompetent to testify. *Id.* The trial court admitted J.S.'s videotaped interview, finding it bore sufficient indicia of reliability. *Id.*[1] Petitioner was found guilty and sentenced to a lengthy prison term.[2] Petitioner filed a direct appeal challenging, *inter alia*, the admission of J.S.'s videotaped interview. *Id.*, 573 N.W.2d at 374. The Minnesota Court of Appeals found the trial court properly admitted the interview because it bore "particularized guarantees of trustworthiness" required under *Idaho v. Wright*, 497 U.S. 805 (1990). *Id.*[3] On February 19,

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[1] J.S.'s five-year-old sister was competent and testified that she had seen "Steve" "put his mouth on J.S.'s "pee-pee" and "private" one day in the men's room by the pool at their aunt's apartment. *Id.*

[2] The trial court initially sentenced Petitioner to 216 months in prison. This determination was reversed because it violated the mandatory minimum sentence required under Minnesota law. The trial court then sentenced Petitioner to 316 months in prison, which was affirmed on appeal. *See Danforth v. State*, 718 N.W.2d 451, 454 (Minn. 2006).

[3] On appeal, Petitioner also urged that admitting the videotape was particularly harmful because the trial court also erred in finding J.S. incompetent. The Minnesota Court of Appeals found Petitioner had waived his right to challenge the incompetency ruling because he had, in fact, urged the trial court to find J.S. incompetent. *Danforth*, 573 N.W.2d at 376.

1998, the Minnesota Supreme Court denied review. Joint Appendix at 1.

On February 3, 1999, Petitioner filed his first petition for postconviction relief in Minnesota state court. The trial court denied relief. The Minnesota Court of Appeals affirmed, *Danforth v. State*, 2000 WL 1780244 (Minn. Ct. App. Dec. 5, 2000), and the Minnesota Supreme Court denied review.

On June 24, 2004, more than eight years after Petitioner was convicted, this Court issued *Crawford v. Washington*, 541 U.S. 36 (2004), holding that, under the Sixth Amendment confrontation clause, the reliability test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny, would no longer control admission of out-of-court testimonial statements by unavailable witnesses. *Id.* at 61. On August 23, 2004, Petitioner filed a second state postconviction petition arguing that admitting J.S.'s videotaped interview violated the new federal rule announced in *Crawford* and seeking a new trial. The trial court found *Crawford* did not apply retroactively to Petitioner's case and denied relief. *Danforth v. State*, 718 N.W.2d 451, 455 (Minn. 2006). The Minnesota Court of Appeals affirmed. *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. Ct. App. 2005).

The Minnesota Supreme Court accepted review. Applying the retroactivity principles this Court set out in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Teague v. Lane*, 489 U.S. 288 (1989), the court held that Petitioner was not entitled to the benefit of the *Crawford*'s new rule. The Minnesota Supreme Court found that it was "compelled" to follow the *Griffith-Teague* retroactivity framework set out by this Court. *Danforth*, 718 N.W.2d at 456.

Citing *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), *Michigan v. Payne* 412 U.S. 47 (1973), and *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Minnesota Supreme Court found that it was not "free to give a Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court." *Id.* Anticipating the precise result this Court reached in *Whorton v. Bockting*, ___ U.S. ___, 127 S. Ct. 1173 (2007), the Minnesota Supreme Court held "*Crawford* established a new rule of federal constitutional criminal procedure that is not within one of *Teague*'s exceptions," and denied relief. *Danforth*, 718 N.W.2d at 460.

On December 6, 2006, Petitioner filed a petition for a writ of certiorari asking this Court to review (1) the Minnesota Supreme Court's determination that it was bound to follow *Teague* in assessing the potential retroactive application of the new rule announced in *Crawford* and (2) the Minnesota Supreme Court's determination that he was not entitled to retroactive application of the *Crawford* decision. On May 21, 2007, this Court granted the petition, limited to Petitioner's first question.

SUMMARY OF THE ARGUMENT

This Court's decisions relating to the retroactivity of its federal constitutional rulings bind states. *Teague v. Lane* is part of a larger body of law by which this Court defines the reach of its federal constitutional rulings. The authority and binding nature of *Griffith*, *Teague*, later cases defining "new rules," "watershed rules," and rules placing certain conduct beyond the power of criminal

lawmaking authority are the same because the decisions form a complete and dependent doctrine. States cannot reject *Teague*'s general rule any more than they can reject *Griffith*, *Teague*'s new rule jurisprudence, or *Teague*'s exceptions. There is no principled reason for distinguishing this Court's exercise of authority in one area of *Griffith-Teague* retroactivity from another. This Court's retroactivity doctrine applies independently of federal habeas, the supervisory authority of this Court, and the law of remedies. *Griffith-Teague* retroactivity doctrine exists separately because it is essential to vindicate federal interests of constitutional supremacy and uniformity, judicial finality, and federalism. As to supremacy, it is fundamental that a single sovereign's law must be applied equally to all. Thus, this Court has recognized the necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution. Allowing states to selectively create certain preferred federal constitutional rights in the name of the federal constitution will mean similarly situated citizens of different states will be treated differently with regard to the same federal constitutional provisions.

If the *Griffith-Teague* retroactivity doctrine did not apply in state courts, supremacy and uniformity problems would be magnified because federal review of state post-conviction proceedings – in both habeas proceedings and direct review by this Court – would be unavailable for decisions that do not follow *Teague*. The lack of federal review deprives the state decision of constitutional legitimacy. Even if not *Teague* barred, this Court's review would ratify state created federal constitutional disparity into its decisions by reviewing the claims of similarly situated

collateral review defendants according to different constitutional standards.

The *Griffith-Teague* doctrine also vindicates federal constitutional values of finality and federalism. Finality interests identified in *Teague* are not unique to federal habeas review. They are present and protected by *Teague* in the context of federal collateral review of federal convictions as well as in review by this Court of federal issues arising in state collateral proceedings. *Teague* also serves the comity interest of validating the reasonable interpretation of existing federal constitutional rules made by state courts – an interest not limited to the federal habeas context. Whether a federal or state judge asserts a new federal constitutional rule to invalidate a reasonable state court interpretation of a federal constitutional rule the state finality interest is subverted.

Against strong supremacy, judicial integrity, finality, and federalism values, Petitioner asserts a state interest in selectively creating enhanced or preferred federal constitutional rights that apply only to citizens of that state. This is not a legitimate state interest. If a state wishes to create preferred rights for its citizens, respect for the political rights of the citizens of the state require a state do so under its own state law subject to the state legal and political constraints attendant to state law decisions. Anything less simply cloaks state law decisions under an illegitimately claimed federal authority for the purpose of avoiding accountability to state citizens.

ARGUMENT

I. THIS COURT'S DECISIONS DEFINING THE RETROACTIVITY OF FEDERAL CONSTITUTIONAL RIGHTS ARE BINDING ON STATE COURTS APPLYING THOSE CONSTITUTIONAL RIGHTS.

Article III of the United States Constitution establishes a "judicial department with the 'province and duty . . . to say what the law is' in particular cases and controversies." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Article III also gives "the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, . . . with an understanding, in short, that a 'judgment conclusively resolves the case because a "judicial power" is one to render dispositive judgments'." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (citing Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)).

At its most basic level, a retroactivity decision is implicit in every decision this Court announces because this Court's ruling and judgment impact events that occurred well before this Court issued its opinion. Thus, the concept of retroactivity is inherent in the judicial decisionmaking process. When this Court decides whether or not to apply a new federal rule in a particular case (*i.e.* makes a retroactivity decision), it is fulfilling its duty to "say what the law is" and render a dispositive judgment in a given case.

In *Griffith* and *Teague*, this Court was asked to decide whether the defendants were entitled to the benefit of new federal constitutional rulings. This Court's answers were exercises of this Court's Article III powers to resolve cases presenting justiciable federal questions. This Court did not

merely announce the "outcome" of a discrete case but also established the "mode of analysis" that this Court would follow when considering retroactivity questions in the future. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). Like the individual outcomes, the *Griffith-Teague* retroactivity framework was an exercise of this Court's power to "say what the law is."

With surprisingly little explanation, Petitioner singles out a small corner of this Court's retroactivity jurisprudence and fastens to it various labels like "policy," "methodology," and "remedy" in the vain hope that the label will be sufficient to allow states to selectively create alternate federal rights valid only in the state of creation. The effort is unavailing. This Court's principles for determining the retroactivity of a new federal constitutional rule, including those announced in *Griffith* and *Teague*, have consistently applied outside of the federal habeas context and to the states.

Until *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court generally adhered to a "Blackstonian" view that new rules completely replaced old rules and were to be applied retroactively. *Id.* at 622-23.[4] In *Linkletter*, this Court

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[4] The issue of federal constitutional retroactivity on collateral review, rarely arose before the 1960's. Until 1867, the Judiciary Act of 1789 limited federal collateral relief to prisoners detained by federal authority. *Wainwright v. Sykes*, 433 U.S. 72, 77-78 (1977). In 1867, Congress extended federal collateral review to persons held in state custody. *Id.* at 78. After 1867, federal collateral review of state court judgments focused, at least in theory, on claims that the state court lacked jurisdiction. *Id.* In *Brown v. Allen*, 344 U.S. 443 (1953), the Court made clear that dispositive federal constitutional law issues could be subject to federal collateral review. *Id.* Thus, prior to *Brown*, federal habeas review of state convictions on the basis of substantive federal constitutional law was relatively rare. *See Desist v. United*

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rejected principles of specific application and said it would "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 629.

Although *Linkletter* involved federal habeas review, this Court later applied *Linkletter* in reviewing state court decisions involving the retroactivity of federal constitutional rulings on criminal collateral review. *See Kitchens v. Smith*, 401 U.S. 847, 848 (1971); *McConnell v. Rhay*, 393 U.S. 2, 3 (1968); *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968) (per curiam); *DeStefano v. Woods*, 392 U.S. 631, 632 (1968); *Witherspoon v. Illinois*, 391 U.S. 510, 513 (1968); *Johnson v. New Jersey*, 384 U.S. 719, 726 (1966). Thus, the *Linkletter* standard was binding on state courts conducting criminal collateral review.

Linkletter posed difficulties in application. *See, e.g., United States v. Johnson*, 457 U.S. 537, 546 n. 9 (1982) (collecting opinions of members of the Court arguing against "selective awards of retroactivity."). In *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court began to abandon *Linkletter* in favor of more specific principles of general applicability. *Griffith* resolves two cases on direct appeal. One was a state court conviction and the other a federal court conviction. The Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on

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States, 394 U.S. 244, 260-61 (1969) (J. Harlan, dissenting). In addition, before *Case v. Nebraska*, 381 U.S. 336 (1965), few states provided meaningful state collateral review proceedings in which federal constitutional issues could be litigated. *See generally*, Larry Yackle, *Postconviction Remedies*, section I at pages 1-3 (1981).

direct review or not yet final." *Id.* at 328. The Court concluded that refusal to apply a new rule to similarly situated defendants with cases pending on appeal "violates basic norms of constitutional adjudication" and "the integrity of judicial review." *Id.* at 322. *Griffith* made explicit what was implicit after *Linkletter*. This Court's retroactivity principles are binding on state courts deciding the retroactivity of federal constitutional rules.

A year after *Griffith*, this Court turned from non-final to final cases. In *Yates v. Aiken*, 484 U.S. 211 (1988), petitioner brought a state collateral challenge to his final conviction, arguing that a burden shifting instruction violated both state and federal constitutional law. Reversing the state postconviction ruling, this Court, presaging *Teague*, and in fact creating an essential part of *Teague*, found constitutional rulings that are not "new" are to be given retroactive effect.[5] Importantly, South Carolina argued in *Yates* that it had authority to establish the scope of its own collateral review proceedings in which it could "refuse to apply a new rule of federal constitutional law retroactively in such a proceeding." *Id.* at 217. This Court rejected that view and found South Carolina had "a duty to grant the relief that federal law requires." *Id.* at 218.[6]

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[5] Later cases of this Court have refined the concept of "new rule" with the effect of narrowing the class of cases on collateral review in which a ruling of this Court will apply retroactively. *See, e.g., Butler v. McKellar*, 494 U.S. 407, 414 (1990); *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). Under Petitioner's view of "constitutional floors, not ceilings," states would be free to ignore the *McKellar* line of cases defining "new rules" in preference to a broader view offering far greater retroactive application. Such a view is contrary to both *Yates* and *Teague*.

[6] This ruling is, of course, wholly incompatible with the position advanced in the brief of Kansas and the Amici States in Support of

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Thus, *Yates* required state courts to follow federal retroactivity decisions when determining federal constitutional issues in state postconviction proceedings.

A year later, in *Teague v. Lane*, 489 U.S. 288 (1989), this Court completed the retroactivity framework begun in *Griffith* and *Yates*. In a plurality opinion that was ultimately adopted by a majority, *see Penry v. Lynaugh*, 492 U.S. 302, 328-30 (1989), this Court criticized *Linkletter* because it led to "unfortunate disparity in the treatment of similarly situated defendants on collateral review" and failed to "account for the nature and function of collateral review." *Teague*, 489 U.S. at 305.[7] As to "the nature and

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Neither Party that because states have no obligation to provide either direct or postconviction review, they are free to disregard federal retroactivity doctrine in the postconviction area. Yet, as to direct review, *Griffith* could not be more clear in requiring states that do provide direct appellate rights to apply this Court's constitutional decisions retroactively. Moreover, quite apart from *Yates'* rejection of the same argument, Amici states do not explain why direct appellate review and postconviction review should be treated differently. In both instances, when a state "has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires." *Yates*, 484 U.S. at 218.

[7] Petitioner contends that the language in *Teague* and its progeny proves that the rule is limited to federal habeas cases. While *Teague* often refers to habeas review and discusses the purposes of the writ, it also speaks in more general terms of "collateral review." *Teague*, 489 U.S. at 306-08. The focus of *Teague* was not habeas specifically, but rather "the important distinction between direct review and collateral review." *Id.* at 308 (quoting *Yates v. Aiken*, 484 U.S. at 215). To buttress this point, this Court cited to *Pennsylvania v. Finley*, 481 U.S. 551 (1987) – a case involving state collateral review. *Teague*, 489 U.S. at 307. The reference to federal habeas in *Teague* and later cases is unremarkable. The federal habeas statute is the vehicle federal courts use to entertain collateral challenges to state court convictions. *Teague* was a federal habeas case as are nearly all of the collateral review cases this Court decides. *Lawrence v. Florida*, ___ U.S. ___, 127 S. Ct. 1079,

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function of collateral review," this Court relied upon the finality "interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision." *Id.* at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (J. Harlan, concurring in part and dissenting in part)). Thus this Court concluded "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system" and held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 309-310.

Teague has two exceptions. The first applies to new rules which place "certain kinds of conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (J. Harlan, concurring in part and dissenting in part)). The second applies to "watershed rules" "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313; *see also, e.g., Saffle v. Parks*, 494 U.S. 484, 495 (1990).

Teague and *Yates* announced the standards for determining the retroactivity of new federal rules on collateral review. *Teague* principles apply not just in federal habeas proceedings, but also on state collateral review. *See, e.g., Yates*, 484 U.S. at 217-18 (reversing state court on new

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1084 (2007). In later decisions, this Court recognized that *Teague* is not just an expression of deference to state court judgments but sets out a broader "nonretroactivity principle." *Wright v. West*, 505 U.S. 277, 307 (1992) (J. Kennedy, concurring).

rule ground); *Roper v. Simmons*, 543 U.S. 551 (2005) (announcing new Eighth Amendment rule retroactively applied in state collateral proceeding); *Kitchens v. Smith*, 401 U.S. 847 (1971) (retroactively applying *Gideon v. Wainwright*, a "watershed rule" to state collateral review); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963) (same).[8] To be certain, if a rule is not "new" or falls within a *Teague* exception, state courts must retroactively apply the federal rule on collateral review, but nothing in this Court's retroactivity doctrine suggests it binds states only if the result would benefit defendants. *See Michigan v. Payne*, 412 U.S. 47 (1973) (reversing state court decision applying new rule retroactively). The question whether *Teague* applies to state collateral review proceedings has already been answered by this Court in the context of its new rule requirement and exceptions.

After *Teague*, this Court confirmed that federal retroactivity standards are binding on state courts applying new federal constitutional rules. In *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), a plurality of this Court found retroactivity of a federal constitutional decision "is a matter of federal law" and that this Court had "consistently required that state courts adhere to this Court's retroactivity decisions." *Id.* at 177-78. The plurality rejected the dissent's view that retroactivity is only remedial saying, "this Court's retroactivity decisions, whether in the civil or criminal sphere, [do not] support

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[8] The NACDL contends the *Teague* exceptions are binding upon the states because they are based on separate due process concerns. *See* NACDL Amicus brief at 28 n. 5. Yet, this Court has said that watershed rules are distinct from due process requirements. *See Tyler v. Cain*, 533 U.S. 656, 667 n. 7 (2001).

the dissent's assertion that our retroactivity doctrine is a remedial principle." *Id.* at 194.

More recently, in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), a majority adopted the *Griffith-Teague* framework for civil cases. This Court reconfirmed that:

> The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law.

Harper, 509 U.S. at 100. This Court also reconfirmed that retroactivity is not a choice of remedy. *Id.* at 100-101.

Although this Court's retroactivity standard has evolved from *Linkletter*'s balancing test to *Griffith-Teague*'s more principled framework, this Court's decisions have uniformly asserted federal control over the retroactivity of federal rights. From *Linkletter*, to *Griffith*, to *Yates*, to *Teague*, to *Harper*, this Court has consistently required state courts to apply this Court's cases in determining the retroactivity of federal constitutional rulings.

Petitioner and Amici offer no sound reason why this Court's authority to enforce a retroactivity decision in one context would be different from its authority to do so in another. The authority underlying *Griffith*, *Teague*, *Teague*'s new rule requirement, and *Teague*'s exceptions (and the binding nature of the decisions on state courts) is, and should be, the same because the decisions together form a complete and coherent set of retroactivity principles. For example,

Teague's exceptions (which Petitioner and Amici agree states must follow) are meaningless if a state is free to disregard *Teague*'s general rule and can treat all cases as if they were "exceptions." This Court's retroactivity doctrine represents a careful and complete approach. Exempting states from one aspect of the equation renders the whole meaningless.

Despite this Court's repeated statements that federal retroactivity doctrine controls state applications of federal constitutional decisions, Petitioner grasps for labels suggesting alternative and non-binding sources of authority for retroactivity doctrine like an overboard sailor desperately seeking anything that might float. None of the labels has buoyancy.

First, this Court's retroactivity doctrine does not rest on the federal habeas statute. As this Court has said, retroactivity doctrine is about choosing the law, "old" or "new," that applies to a given case. That choice of law is distinct from federal habeas inquiry. *See Horn v. Banks*, 536 U.S. 266, 272 (2002) ("if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct.") (citing *Tyler v. Cain*, 533 U.S. 656, 669-670 (2001) (J. O'Connor, concurring) and *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000); *see also Wright v. West*, 505 U.S. 277, 291 n. 8, 303-304 (1992) (J. O'Connor, concurring). Federal retroactivity doctrine cannot be explained as an interpretation of the federal habeas statute because the federal habeas statute in effect at the time *Griffith* and *Teague* were announced provided no textual support for the substance of the principles this Court adopted. *See* 28 U.S.C. § 2254 (1966), current version at 28 U.S.C. § 2254 (1996). Federal habeas and retroactivity are distinct inquiries.

Second, this Court's retroactivity doctrine does not rest on the supervisory powers of this Court. If this Court's retroactivity doctrine were so limited, *Griffith*, the *Teague* new rule requirement, and the *Teague* exceptions, *American Trucking*, and *Harper* would not be binding on the states. Moreover, *Teague* cannot be an exercise of supervisory powers because this Court could not use its supervisory authority to limit a constitutional rule like *Griffith*. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) ("[i]t is well established that '[e]ven a sensible and efficient use of supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.'").

Finally, retroactivity doctrine is distinct from the question of remedy. This Court has repeatedly said that retroactivity is independent of the question as to what remedy might be available under applicable law. *See Harper*, 509 U.S. at 99-102 (distinguishing remedial limitations from retroactivity); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("The *Teague* doctrine, however, does not involve a special 'remedial' limitation on the principle of 'retroactivity' as much as it reflects a limitation inherent in the principle itself."); *American Trucking*, 496 U.S. at 194 ("this Court's retroactivity decisions, whether in the civil or criminal sphere, [do not] support the dissent's assertion that our retroactivity doctrine is a remedial principle.").

This Court's retroactivity doctrine, including the principles set out in *Griffith* and *Teague*, can only be understood under this Court's cases as an exercise of binding federal authority over the reach of its federal constitutional rulings.

II. *GRIFFITH-TEAGUE* IS BINDING FEDERAL AUTHORITY BECAUSE IT IS ESSENTIAL TO VINDICATE PRINCIPLES OF SUPREMACY, JUDICIAL INTEGRITY, FINALITY AND FEDERALISM.

This Court has applied the *Griffith-Teague* retroactivity doctrine to the states because it is essential to vindicate principles of supremacy, judicial integrity, finality, and federalism.

A. Supremacy and Judicial Integrity.

Requiring states to apply *Griffith-Teague* retroactivity is essential to federal constitutional supremacy and uniformity. Allowing states to selectively create certain preferred rights in the name of the federal constitution will mean similarly situated citizens of different states will be treated differently with regard to the same textual provisions of the federal constitution. Although Petitioner's Brief is notably silent in this regard, the authorities he relies upon concede this point. *See* Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 Ala. L. Rev. 421, 447-48 (1993) (observing that state court "experimentation" with new federal rules in state collateral proceedings would give rise to "serious complications." In particular, the uniform application of rights will "disappear."); *Smart v. State*, 146 P.3d 15, 26 (Alaska Ct. App. 2006) *rev. granted* (Feb. 2007) ("It is true that if the states have different retroactivity rules, defendants seeking postconviction relief under state law will meet with different results [as a matter of federal law,] depending on which state law governs their litigation.").

This Court has long recognized the "necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-348 (1816). "The goal of national uniformity rests on a fundamental principle: that a single sovereign's law should be applied equally to all. . . ." Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 4 (1985). If supremacy means anything, state courts may not substitute their own judgments for those of this Court as to retroactivity. *See*, *Harper*, 509 U.S. at 100 ("The Supremacy Clause, U.S. Const. Art VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law."); *American Trucking*, 496 U.S. at 178 (the Court has "consistently required that state courts adhere to our retroactivity decisions" "to ensure the uniform application of decisions construing constitutional requirements.").

Requiring *Griffith-Teague* to control in state as well as federal collateral review vindicates the principle that constitutional decisions must be applied in a uniform fashion to similarly-situated people. "[S]tate courts handle the vast bulk of all criminal litigation in this country." *Michigan v. Long*, 463 U.S. 1032, 1042 n. 8 (1983). In 2004, there were more than 20 million criminal cases filed. Court Statistics Project, *State Court Caseload Statistics, 2005* (National Center for State Courts 2006), Table 1. "The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of 'federal law' in the process." *Long*, 463 U.S. at 1042 n. 8. With millions of state criminal cases and the limited ability of this Court to review those cases, the task of achieving clarity and uniformity in federal constitutional

decisions will be extremely difficult if states are free to disregard federal retroactivity standards and to selectively create certain preferred federal constitutional rights good only in a single state.

For example, if *Whorton v. Bockting* is not binding precedent, the Minnesota Supreme Court may decide to apply it or not, just like each of the forty-nine other states. In *Whorton*'s stead, the Minnesota Supreme Court may apply a *Linkletter*-like analysis (which this Court has discarded). It may ignore *Griffith* and simply apply *Crawford* to all judgments final and non-final alike. It may accept *Teague*'s framework, but adopt a more liberal construction of what "new" rules are thereby rejecting this Court's decisions in *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Graham v. Collins*, 506 U.S. 461 (1993); *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Caspari v. Bohlen*, 510 U.S. 383 (1994); and *Lambrix v. Singletary*, 520 U.S. 518 (1997). It may adopt different constructions of *Teague*'s exceptions. It could ignore this Court's decision in *Whorton*, and find *Crawford* is a "watershed" rule. It may purport to apply the precise test in *Teague* but simply come to a different conclusion from *Whorton*. All the while, Minnesota would be claiming to apply the same Sixth Amendment as each of the other forty-nine states.[9]

The problem is real. For example, the Alaska Court of Appeals has held that it is not bound by *Teague* and has

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[9] These examples are not, by any means exhaustive. Under Petitioner's view, a state could, for example, declare that this Court's federal constitutional rulings would apply retroactively only if fewer than ten prisoners of that state would be entitled to postconviction relief.

ruled that the Sixth Amendment rights announced in *Blakely v. Washington*, 542 U.S. 296 (2004) will be applied retroactively on state collateral review. *Smart*, 146 P.3d at 27. In contrast, Minnesota prisoners whose convictions are final will not be resentenced. *See State v. Houston*. 702 N.W.2d 268, 273 (Minn. 2005); death penalty defendants on collateral review in Missouri will have *Ring v. Arizona*, 536 U.S. 584 (2002) applied to their cases, *Whitfield v. State*, 107 S.W.3d 253, 268 (Mo. 2003); while similarly situated death penalty defendants in Idaho will not. *Hairston v. State*, 156 P.3d 552, 559 (Idaho 2007). The problem will be compounded with each new federal constitutional rule this Court announced.

Uniformity problems would be magnified under the system Petitioner advocates because state court decisions in non-*Teague* jurisdictions would be effectively shielded from federal review. For example, if *Whorton* were not binding, the Minnesota Supreme Court could choose to apply *Crawford* retroactively on the ground that, in Petitioner's case, it changes only the rationale and not the result. *Cf. Crawford*, 541 U.S. at 60. The Minnesota court would, therefore, rule the videotaped statement of the six-year-old sex abuse victim is not testimonial and is admissible. *See State v. Krasky*, A04-2011, 2007 WL 2264711 (Minn. August 9, 2007) (videotaped statement of incompetent six year old victim of child sexual abuse is non-testimonial and admissible under *Crawford* and *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266 (2006)); *see also State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006), *cert. denied*, 127 S. Ct. 382 (2006) (out of court statements of child victim made to medical professional were non-testimonial); *State v. Scacchetti*, 711 N.W.2d 508 (Minn.

2006) (same).[10] If Petitioner filed a petition for a writ of habeas corpus in federal court challenging the state court's ruling, his claim would be barred under *Teague*. *See Horn v. Banks*, 536 U.S. 266, 271 (2002) (*Banks I*); *Nunley v. Bowersox*, 394 F.3d 1079, 1081 (8th Cir. 2005) (applying *Teague* to bar Missouri defendant's claim despite the fact that state court, ignoring *Teague*, applied new rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002) retroactively to other defendants on state collateral review).

Federal habeas corpus proceedings are the nearly exclusive means of federal court review of state court decisions. *Lawrence v. Florida*, ___ U.S. ___, 127 S. Ct. 1079, 1084 (2007) (noting this Court "rarely" takes cases directly from state collateral review preferring instead to wait until the case has been litigated in a federal habeas proceeding). In 2004, state prisoners filed 23,569 habeas petitions in federal district court. The same year, this Court reviewed one case on direct appeal from a state collateral proceeding. *See* Leonidas Ralph Meeham, *Administrative Office of the United States Courts, 2005 Annual Report of the Director*, Table C-2A (*available at* http://www.uscourts.gov/judbus2005/appendices/c2a.pdf); *The Supreme Court, 2004 Term: The Statistics*, 119 Harv. L. Rev. 415, 428 (2005). If *Teague* is not binding on the states, federal habeas review, the nearly exclusive and preferred means of federal court review, will be unavailable for state court

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[10] The statement of Amicus NACDL that no one would deny Petitioner's "Confrontation Clause rights were, in fact, violated by the admission of the videotaped statement against him," NACDL brief at 24, is wrong on at least two fronts. First, the whole point of *Griffith-Teague* is that Petitioner's confrontation clause rights must be determined in reference to the time his conviction became final. More ironically, the Minnesota Supreme Court disagrees with the NACDL position even in the context of applying *Crawford* to Petitioner's case.

rulings declining to follow *Teague* and issuing interpretations of new federal constitutional rulings.

If Petitioner sought review in this Court directly from the Minnesota Supreme Court's ruling, the result would be equally problematic. Since application of this Court's retroactivity doctrine and federal habeas are distinct inquiries, *see supra* at 16, *Teague* would apply independent of federal habeas review to bar this Court's review of the state court's decision, and Minnesota's decision that the videotape is admissible would stand.[11] Yet, as this Court has recognized, the values of uniformity and comity are undercut when a state court's federal constitutional ruling is not subject to federal review. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 623 (1989) (noting that state court rulings not subject to review are deprived of legitimacy). Even if this Court were to ignore *Teague* and accept review, this Court would necessarily ratify state created disparities on matters of federal constitutional law among

[11] If *Teague* did not bar review in this Court, review would likely be barred anyway because this Court could not reverse on the question of the admissibility of the videotape without also reversing the basis for the Minnesota Supreme Court's retroactivity ruling. They are dependent. As a result, the ruling would be advisory, because this Court could not require the Minnesota Supreme Court to retroactively apply *Crawford*. The larger point the example illustrates is the difficulty with Amicus ACLU's suggestion that retroactivity questions arise independently from constitutional rulings. ACLU brief at 5 n. 2. As to this point, first, if this Court's retroactivity principles are not controlling, states remain free to adopt retroactivity rulings in a case-by-case manner that are fully dependent upon nature and substance of the constitutional ruling at issue. Second, the argument does not account for *Griffith*, in that *Griffith* is binding on the states yet is completely independent of the nature of the constitutional ruling at issue. Third, *Teague*, with its "new rule" and exceptions, is fully dependent on the nature of the constitutional ruling at issue.

similarly situated collateral review defendants. Thus, if this Court were to review the Missouri court's judgment in *Whitfield* and the Idaho court's judgment in *Hairston*, it would have to apply different law to similarly situated defendants even though both defendants' claims "arise under" the same constitutional provision and in the same procedural posture.[12]

Petitioner asks this Court to dramatically extend state court authority to interpret the federal constitution. Petitioner also asks this Court to do so in a way in which those interpretations are largely shielded from federal court review. Both ideas are bad. The combination is intolerable. Requiring state courts to follow *Teague* in resolving federal constitutional issues on collateral review is essential. *Teague* is, in this sense, an instrument of federal constitutional supremacy and uniformity.[13] Similarly situated

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[12] Sanctioning disparate federal rights between similarly situated defendants in different states will also open the door to due process claims. Once the state courts in one state grant retroactive benefit of a new federal rule to its defendants, similarly situated defendants in other states will argue that they are entitled to the benefit. *Cf. Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir. 1990) (holding State of California violated federal equal protection clause by applying new state constitutional rule to one defendant while denying retroactive benefit to a similarly situated defendant); *Williams v. Armantrout*, 891 F.2d 656, 659-660 (8th Cir. 1989), *vacated on other grounds*, 912 F.2d 924 (8th Cir. 1990) (holding State of Missouri violated federal equal protection clause by applying new state constitutional rule in an uneven manner to similarly situated defendants).

[13] Under *Teague*, if a new rule is created and applied to the defendant on collateral review, "the ideal of the 'administration of justice with an even hand'" requires it to apply "to all others similarly situated" *Teague*, 489 U.S. at 315-316. That is why *Teague* refuses to announce a new rule in cases on collateral review, unless the rule fits within one of the two narrow exceptions authorizing retroactive

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defendants in different states should not have different federal constitutional rights, when these rights are dependent upon the same textual provisions. As Justice Scalia wrote in a different context, "turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each state Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt." *Kansas v. Marsh*, ___ U.S. ___, 126 S. Ct. 2516, 2531 (2006) (concurring). The federal constitution should not vary depending on the state in which it is applied.

B. Finality-Federalism.

Finality is an inherent component of, and essential to, the functioning of the American judicial system. *See Spendthrift Farms*, 514 U.S. at 227 (observing "a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed) is implicit" in Article III). *Teague*'s general rule vindicates finality by limiting those instances in which federal constitutional rules may be applied to disturb final criminal judgments on collateral review. In explaining why *retroactivity* must be different on collateral review of final convictions, Justice Harlan said it is "a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process." *Williams v. United States*, 401 U.S. 676, 690 (1971) (J. Harlan, concurring in part and dissenting in part).

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application to all defendants on collateral review. *Teague*, 489 U.S. at 316.

> If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Id. at 691. Justice Harlan pointed out that failing to take account of finality interests seriously distorts the limited resources society has allocated to the criminal process noting "it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final." *Id.* Justice Harlan argued that distortion of resources is compounded by the fact that relitigating old cases necessarily involves trying stale facts through witnesses whose memories have often dimmed, "ironically" producing "a second trial no more reliable as a matter of getting at the truth than the first." *Id.*

Against these interests, Justice Harlan weighed the purported benefits of applying a new constitutional rule on collateral review and found them "overstated." *Id.* at 689. He said:

> Some discrimination must always exist in the legal treatment of criminal convicts within a system where the governing law is continuously

> subject to change. And it has been the law, presumably for at least as long as anyone currently in jail has been incarcerated, that procedures utilized to convict them must have been fundamentally fair . . . Moreover, it is too easy to suggest that constitutional updating is necessary in order to assure that the system arrives at only "correct" results. By hypothesis, a final conviction, state or federal, has been adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it. To argue that one of these "inferior" courts is somehow forever erroneous because years later this Court took a different view of the relevant constitutional command carries more emotional than analytic force.

Id. at 689-690. This Court endorsed Justice Harlan's views on finality in *Griffith* and *Teague*. *See Griffith*, 479 U.S. at 322-24; *Teague*, 489 U.S. at 303-10.

The *Griffith-Teague* framework recognizes the fundamental distinction between final and non-final convictions. Under *Griffith*, new rules are applied to pending cases, state or federal, because respect for final judicial decisions is not implicated. Under *Teague*'s general rule, the interest in leaving final convictions, in a state of repose is recognized, in part, for reasons relating to respect for the final judgments of courts, state or federal. It is an interest independent of comity. If this were not the case, federal courts would not apply *Teague* in collateral attacks on federal convictions under 28 U.S.C. § 2255. Yet, every circuit court that has considered the issue has held that *Teague* applies collateral attacks on federal cases as well

as state court cases.[11] In this sense, *Teague* is not solely an expression of deference to state court judgments. It recognizes a value in the integrity of final judgments that is not dependent on forum.

Teague also promotes federalism by vindicating the states' interests in the finality of its properly obtained convictions. As this Court said in *Teague*:

> In many ways, the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions. *Cf. Younger v. Harris*, 401 U.S. 37, 43-54, 91 S. Ct. 746, 750-55, 27 L.Ed. 669 (1971), for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court

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[11] *See, e.g., Gilberti v. United States*, 917 F.2d 92, 94-95 (2d Cir. 1990); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998); *Van Daalwyk v. United States*, 21 F.3d 179, 182-83 (7th Cir. 1994); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667-68 (9th Cir. 2002); *Daniels v. United States*, 254 F.3d 1180, 1194 (10th Cir. 2001) (en banc); *United States v. Swindall*, 107 F.3d 831, 834 n. 4 (11th Cir. 1997) (per curiam); *see also, e.g., Sepulveda v. United States*, 330 F.3d 55, 66 (1st Cir. 2003) (assuming *Teague* applies to Section 2255 claims); *United States v. Swinton*, 333 F.3d 481, 487-88 (3d Cir. 2003) (same); *United States v. Brown*, 305 F.3d 304, 307 (5th Cir. 2002) (per curiam) (same); *Lang v. United States*, 474 F.3d 348, 354 n. 8 (6th Cir. 2007) (same); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001) (same); *United States v. Ayala*, 894 F.2d 425, 429 n. 8 (D.C. Cir. 1990) (same). In addition, this Court has applied an exception to *Teague* in a Section 2255 proceeding without any suggestion that *Teague* does not apply in that context. *See Bousely v. United States*, 523 U.S. 614 (1998).

> discover during a [habeas] proceeding, new constitutional commands."

Id. at 310; *see also Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (purpose of *Teague* is to promote the finality of state court judgments); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (new rule principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions").

Importantly, both finality and comity interests are involved whether a federal or state court undertakes the task of applying federal constitutional rules to collateral review of final state judgments. In both instances, the question is not what state law requires, it is what the federal constitution requires. Missing this point, Petitioner argues that a state court's decision regarding retroactivity of federal constitutional rules reflects some unique and unidentified state interest and is entitled to respect, indeed complete deference, by this Court. Yet, a state court determines federal interests, not unique state interests, by applying a federal constitutional rule.

Thus, in *Beard v. Banks*, 542 U.S. 406 (2004) (*Banks II*), defendant argued the Pennsylvania Supreme Court's practice of declining to apply waiver principles to capital cases rendered convictions nonfinal and therefore outside of *Teague*'s dictates. This Court disagreed, stating that the argument "reflects a fundamental misunderstanding" of "*Teague*'s nonretroactivity principle." *Id.* at 412. The Court observed *Teague* "protects not only the reasonable judgments of state courts but also the State's interest in finality quite apart from their courts." *Id.* at 413. *Cf. also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (reversing

circuit court's recall of mandate denying habeas relief where recall failed to vindicate finality "shared by the State and the victims of crime" alike). Whether a state court may be willing to forego the protection accorded to its reasonable judgment as a matter of state law, the state court cannot eclipse the shared federal and State's (of its citizens and executive branch) interest in the finality of a fairly obtained conviction.

Teague protects finality and comity even in the face of a state court willing to discount these interests. It does so because a state court applying a federal law is not acting as an agent loyal only to a state. For example, a state court deciding whether a commerce clause ruling of this Court applies retroactivity to invalidate a state tax is not free to choose the federal constitutional ruling imposing the least fiscal burden on state residents. The judge, regardless of state interest, is obligated to follow this Court's retroactivity doctrine. *See American Trucking*, 496 U.S. at 177; *Harper*, 509 U.S. at 100.[15] At bottom, whether

[15] Petitioner asserts *Teague* cannot be binding on state courts because *Teague* can be waived or forfeited by the government. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *Schriro v. Summerlin*, 510 U.S. 222, 228 (1994); *Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990). That *Teague* can be waived is unrelated to its status as binding federal authority. *Bohlen*, *Schriro* and *Youngblood* simply recognize the quite unremarkable proposition that *Teague*, like many other constitutional provisions, is subject to waiver by a party. *See Peretz v. United States*, 501 U.S. 923, 936 (1991) (holding that a defendant can waive any right to have an Article III judge preside over jury selection by failing to assert the claim in a timely fashion. As this Court has observed, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right." *Id.*, 501 U.S. at 936-37 (citing *Yakus v. United States*, 321 U.S. 414, 444 (1944)). Moreover, it is quite a leap to infer from a party's ability to waive a defense, that a state court judge, sworn to uphold the federal constitution, may do so

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one views *Teague* as a limitation on judges (state or federal) who, in the name of the federal constitution, wish to upset final convictions, or as a positive command to apply the federal law at the time the conviction became final, the result is the same. New federal constitutional rules that do not fall within *Teague*'s narrow exceptions, are not to be used to upset the finality of state court convictions.

If a state court deviates from *Teague*, it grants relief that is not required under federal law and is inconsistent with the federal and state interests identified by Justice Harlan and in *Griffith*, *Teague*, and their progeny. Unlike

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without consent. Finally, *Youngblood* contradicts Petitioner's claim that *Teague* is not a constitutionally-based defense. In support of its conclusion that *Teague* is not "'jurisdictional' in the sense that this Court, . . . *must* raise and decide the issue *sua sponte*," this Court compared *Teague* to the Eleventh Amendment sovereign immunity defense waived in *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 515 n. 19 (1982). *Youngblood*, 497 U.S. at 41.

Notably, even in instances where the Court has declined to apply *Teague*, the results reached by this Court are consistent with *Teague*'s essential mandates. None of the decisions announced a "new rule" or extended existing precedent to overturn a final conviction on collateral review. *See Godinez v. Moran*, 509 U.S. 389, 397 (1993) (rejecting court of appeals' extension of Supreme Court precedent regarding the competence requirement for pleading guilty and waiving counsel and reversing grant of writ); *Parke v. Raley*, 506 U.S. 20, 37 (1992) (reversing court of appeals' issuance of writ where court applied a circuit rule, announced after conviction was final, that changed the burden of establishing the validity of a conviction used to enhance a sentence); *Schriro*, 510 U.S. at 231-32, 114 S. Ct. at 790 (refusing to grant collateral relief where defendant claimed that sentencing phase in capital case was "successive prosecution" and that death sentence imposed violated Double Jeopardy Clause); *Youngblood*, 497 U.S. at 52 (refusing to collateral relief where defendant claimed that state statute that allowed reformation of improper verdicts violated Ex Post Facto Clause).

a state court applying state law and vindicating a state interest, a state court applying a federal constitutional rule is vindicating federal interests. In the case of *Teague*, supremacy, uniformity, judicial integrity, finality, and federalism require keeping new federal constitutional rules from upsetting final state court judgments.

III. IF A STATE WISHES TO SELECTIVELY CREATE PREFERRED OR ENHANCED RIGHTS FOR ITS CITIZENS, FEDERALISM AND STATES RIGHTS REQUIRE STATES TO DO SO UNDER STATE LAW THAT IS SUBJECT TO THE LEGAL AND POLITICAL CONSTRAINTS ATTENDANT TO STATE LAW DECISIONS.

States have no legitimate interest in creating federal constitutional rights that apply only to citizens of their own state. Yet, through his "floors and ceilings" approach Petitioner asserts just such a state interest. If a state wishes to selectively create enhanced rights, good only for citizens of that state, federalism and respect for the political rights of the citizens of the state require that a state do so under its own state law subject to the constraints attendant to state law decisions.

Not surprisingly, this Court has already rejected the notion that states are free to disregard the rulings of this Court while striking out to create federal constitutional rules good only for citizens of their own state. In *Oregon v. Hass*, 420 U.S. 714 (1975), the defendant was convicted after his non-*Mirandized* and voluntary statement was admitted for impeachment purposes. Admitting the statement was consistent with *Harris v. New York*, 401 U.S. 222 (1971). On appeal, the Oregon Supreme Court, disagreed with *Harris* and ruled that, as a matter of

federal constitutional law, such statements could not be used for impeachment purposes. *Hass*, 420 U.S. at 718-19. On appeal to this Court, the defendant raised the same "floors and ceilings" argument Petitioner raises in this case.

Rejecting the argument, this Court addressed two propositions the Oregon Supreme Court had asserted. The first was that Oregon could interpret its own state constitution as affording individuals broader rights under the Oregon State Constitution than are provided by the Fourth Amendment. This Court said the proposition "is, of course, good law." *Id.*, 420 U.S. at 719 n. 4. The second proposition was that the Oregon courts can interpret the Fourth Amendment of the federal constitution as affording individuals broader rights than the federal constitution as set out by this Court. This Court said this proposition was "unsupported by any cited authority, is not the law and surely must be an inadvertent error; in any event, we reject it." *Id.* States are not free to ignore this Court's rulings with respect to the contours of federal rights while purporting to rely on those same federal rights as a source of authority.[16]

Hass is fully consistent with the view that states should serve as laboratories of experimentation for legal doctrine. The proposition that as a matter of state law, a state may afford greater rights "is, of course, good law."

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[16] Ironically, Professor Tribe has described *Hass* as rejecting Petitioner's argument in the very same terms Petitioner chooses. He wrote that under *Hass* "[s]tate courts were thereby compelled to treat the federal Constitution as setting both a ceiling and a floor on the extent of protection that can be accorded in its name." Laurence H. Tribe, *American Constitutional Law* 263 (3rd ed. 2000).

Hass, 420 U.S. at 719 n. 4. *Hass* just says that, in running the laboratory, states may not use the United States Constitution as a lab rat. There are good reasons for declaring the federal constitution off-limits for experimentation. First, the notion runs head on into federal constitutional supremacy and uniformity. *See supra* at 18-25.[17] Second, as Professor Tribe has noted, "it seems clear that the *Hass* rule serves more to advance than to retard responsible constitutional decisionmaking. . . . if the state court's interpretation of federal law in *Hass* had remained in place, it could not have been overturned through that state's political processes." Laurence H. Tribe, *American Constitutional Law* 263 (3rd ed. 2000).[18] Requiring states to use state law when granting the citizens of their own states broader individual rights than those provided by the federal constitution, serves not only the interest of federal uniformity, but also the proper regard for the political rights of the citizens of the affected state. It does so by requiring state courts to subject decisions affording broader individual rights than the federal constitution to state political and legal processes. Put another way, a state court should be fully politically and legally accountable for its decisions when those decisions do not rest upon the federal constitutional views of this Court.

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[17] Moreover, even absent the Supremacy argument (something that is difficult to ignore) as a practical matter, with limited review capacity, this Court is ill-suited to supervise a federal constitutional laboratory with fifty states all busy conducting experiments.

[18] Professor Tribe in this passage corrects the previous edition of his treatise in which he accepts and espouses Petitioner's floors and ceilings approach under the rubric of "underenforced constitutional norms." *Compare id. with* Laurence H. Tribe, *American Constitutional Law* 31-33 (1st ed. 1978).

Finally, state court reliance on the federal constitution to provide its own state citizens unique rights actually retards development of state law as a means promoting favored rights. In *Smart v. State*, 146 P.3d 15 (Alaska App. 2006), the Alaska Court of Appeals dealt with the application of *Blakely v. Washington*, 542 U.S. 296 (2004), to cases on postconviction review. Rejecting *Teague* and creating broader Sixth Amendment rights available only to collateral review defendants in Alaska, the court of appeals upset the finality of defendant's sentence and granted a resentencing jury. The court of appeals did so despite recognizing that the Alaska Supreme Court had "suggested that the framers of our state constitution intended to adopt a right of jury trial broader than the right recognized at that time under federal law." *Smart*, 146 P.3d at 38. The court of appeal's decision raises important questions. First, if limiting *Teague* is essential to keeping federal authority out of the states' way in protecting individual liberties, why did Alaska never construe its broader state constitutional jury trial right as imposing a *Blakely*-type requirement and what is keeping Alaska from doing so now?[19] Second, what do the citizens of Alaska do if they are unhappy with the unique non-compulsory federal right the Alaska Court of Appeals has sent into Alaska prisons to upset the finality of sentences?

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[19] The dissent in *Smart* suggests one possible answer: that the Alaska "supreme court would not favor adopting *Blakely* under the Alaska Constitution and applying Alaska law on retroactivity." *Smart*, 146 P.3d at 42.

IV. THE STRONG INTERESTS *TEAGUE* RESTS UPON AND THE LACK OF ANY LEGITIMATE COUNTERVAILING STATE INTEREST REQUIRES *TEAGUE* APPLY TO STATE COLLATERAL REVIEW PROCEEDINGS.

There is no real disagreement that this Court's doctrine relating to the retroactivity of federal constitutional rulings imposes a federal requirement. For *Teague*, the requirement is that the federal constitutional rule in effect at the time defendant's conviction became final must be used to determine whether the defendant is entitled to collateral relief. The crux of the matter, therefore, is not the source of this Court's authority to adopt the retroactivity principles of *Griffith*, *Teague*, and the civil cases, and that Petitioner spends so much effort seeking to redefine as "methodology," "policy," or "remedy." This Court's retroactivity doctrine as set out in *Griffith*, *Yates*, *Teague*, *Teague*'s new rule requirement, *Teague*'s exceptions, and the civil cases, is federal authority that is binding on the states and has served well for more than twenty years without a label. Even Petitioner agrees that in the one small corner of retroactivity doctrine he claims as distinct from *Griffith*, *Teague*'s new rule analysis, *Teague*'s exceptions, and the civil cases, federal authority sets what he describes as the minimum constitutional requirements.

The crux of the matter, therefore, is whether, relying on the authority of the federal constitution, a state may ignore *Teague* (and, in this case, *Whorton v. Bockting*), and declare, in a declaration good in one state only, that citizens enjoy a federal constitutional right more broadly protective of individual rights (and less subject to federal court review). *Oregon v. Hass* answers the question in the negative, and for very sound reasons.

There are strong interests identified and at work in *Teague* and its progeny. Federal constitutional supremacy and uniformity, served by having citizens of all states operate under the same federal constitutional rules, is essential to our federal constitutional system. Finality and federalism, served by leaving state convictions which have become final free from upset by changing federal constitutional law, are also essential to our federal constitutional system. In the face of these essential federal and state interests (interests *Teague* fully recognizes and serves), Petitioner puts up a notion, already rejected by this Court, that states should be set loose on a course of selectively enhancing preferred individual rights as a matter of federal constitutional interpretation. States are, of course, free to prefer select individual rights, but they must do so under their own state law. Acting under state law, a state can prefer select individual rights in a manner that implicates none of the important interests identified above. Acting under state law, state decisions will be fully accountable to all of the state political and legal processes that should bear on the decision, rather than sneaking past state citizens under a cloak of illegitimate federal authority.

At the end of the day, whether one characterizes the essential federal constitutional interests the *Griffith-Teague* retroactivity principles recognize as enforcement of constitutional norms and the integrity of judicial decision making under Article III, *see Griffith*, 479 U.S. at 322, federal supremacy, *see* U.S. Const. Art. VI, cl. 2; *Harper*, 509 U.S. at 100, preemption, *see Gonzales v. Oregon*, 546 U.S. 243 (2006), reverse Erie, *see Felder v. Casey*, 487 U.S. 131, 161 (1988) (J. O'Connor, dissenting), an application of federal common law, *see Wallace v. Kato*, ___ U.S. ___, 127 S. Ct. 1091 (2007), or simply leaves the result without a

label, *see, e.g., Yates*, 484 U.S. at 217-218 (reversing state collateral review case); *Roper v. Simmons*, 543 U.S. 551 (2005) (same); *Kitchens v. Smith*, 401 U.S. 847 (1971) (same); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963) (same), the result is the same. The Minnesota Supreme Court correctly ruled that *Griffith* and *Teague* required it to apply the relevant federal rule as it existed when Petitioner's conviction became final.

CONCLUSION

Respondent, the State of Minnesota, respectfully requests this Court to affirm the decision of the Minnesota Supreme Court.

Respectfully submitted,

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Dated: August 23, 2007

No. 06-8273

IN THE

Supreme Court of the United States

STEPHEN DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Minnesota

REPLY BRIEF FOR PETITIONER

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IN THE

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STEPHEN DANFORTH,
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REPLY BRIEF FOR PETITIONER

I. INTRODUCTION

This case is before the Court on grant of certiorari from a state postconviction proceeding, originating in state court, in which petitioner Stephen Danforth challenged his conviction for a violation of a state law. Petitioner seeks to use state law to allow the Minnesota Supreme Court to consider the validity of his conviction under the current understanding of the meaning of the Confrontation Clause of the Federal Constitution. Respondent contends that this Court in *Teague v. Lane*, 489 U.S. 288 (1989), deprived the Minnesota state courts of their ability to fully adjudicate petitioner's Federal constitutional claims. Respondent is wrong.

II. ALLOWING STATE COURTS TO USE BROADER RETROACTIVITY STANDARDS THAN *TEAGUE* SETS FORTH WOULD NOT AFFECT THE ABILITY OF THE FEDERAL COURTS TO REVIEW IMPORTANT FEDERAL CONSTITUTIONAL ISSUES.

Respondent posits that this Court would be unable to review the merits of any decision on Federal constitutional issues reached by a state court that entertains a claim that the *Teague* rule, if properly invoked, would prevent a federal habeas court from considering. Resp. Brief at 21-24. Respondent is incorrect.

Assume that the Minnesota Supreme Court considered whether the statement at issue in this case was admitted in violation of *Crawford v. Washington*, 541 U.S. 36 (2004). No matter which party prevailed in state court, this Court would be able to review the state court's substantive ruling on whether petitioner's rights under the Confrontation Clause were violated. If the state court concluded that the statement at issue was testimonial, was admitted in violation of petitioner's Confrontation Clause rights, and that the error entitled petitioner to a new trial, the State could petition this Court for a writ of certiorari to review the substantive *Crawford* issue.[1] Petitioner is not aware of any authority that would

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[1] The only judge to ever consider this issue ruled that the statement "was testimonial for purposes of *Crawford*." *Danforth v. Crist*, 2005 WL 2105502, *2 (D. Minn. Aug. 26, 2005) (citing *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) (attached in appendix to petition for certiorari at F-1)). Of course, the merits of petitioner's Confrontation Clause claim are not before the Court.

allow him to insulate a state court's decision on the substantive meaning of the Sixth Amendment from this Court's review.

If the state court concluded that the statement at issue was not testimonial, this Court could grant petitioner's petition for writ of certiorari to review the state court's substantive *Crawford* decision. Respondent claims that, in that scenario, it would be able to block this Court's review of the Confrontation Clause issue by invoking the *Teague* rule. This is incorrect. *Teague* is a rule for habeas courts, and this Court, directly reviewing a decision of a state court, is not a habeas court. The only limit that this Court has suggested exists on its ability to directly review federal questions presented in a state-court case is that the parties thereto, or at least the petitioner, must satisfy Article III standing requirements. *See United States Dept. of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *ASARCO Inc. v. Kandish*, 490 U.S. 605, 623-24 (1989). Both parties to a pending criminal case, including one on state-court postconviction review, would satisfy such requirements. Nothing about *Teague* suggests otherwise. *See Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (*Teague* rule is not a jurisdictional one). *See also* 28 U.S.C. § 1257(a) (1988) (Supreme Court has jurisdiction to review any "judgments or decrees rendered by the highest court of a State" where, among other things, "any title, right, privilege, or immunity is specially set up or claimed under the Constitution").

This Court has repeatedly considered without criticism situations in which state-court civil plaintiffs and criminal defendants use state law to open the state courthouse door for consideration of the merits of Federal claims that might not be cognizable

in federal court. This was the situation in *ASARCO*, *see* Pet. Brief at 32-34, and in *Virginia v. Hicks*, 539 U.S. 113 (2003).

In *Hicks*, a state-court criminal defendant challenged his trespassing conviction, arguing that the policy he was alleged to have violated was unconstitutionally overbroad in violation of the First Amendment. *Hicks*, 539 U.S. at 118. Because Hicks did not contend that he was engaged in any constitutionally protected conduct at the time of the offense, Virginia and the United States as *amicus* asked the Court to "impose restrictions on 'the use of overbreadth standing'"; restrictions that would have eliminated Hicks' ability to challenge the policy. *Id.* at 120. This Court unanimously refused to even consider such restrictions because it was "reviewing . . . the decision of a State Supreme Court," and the Court's authority to limit jurisdiction only applies to federal courts. *Id.* (emphasis original). Whether the state court "should have entertained th[e] [Federal Constitutional] challenge [in *Hicks*] [was] entirely a matter of state law." *Id.* (emphasis original). So too is the issue of whether the Minnesota state courts should have entertained petitioner's claim that his conviction should be reversed because his rights under *Crawford* were violated. The substance of that claim is governed by federal law, just as it was in *Hicks* and *ASARCO*. But "[w]hether [the state court] should have entertained [the]...challenge is entirely a matter of state law." *Hicks*, 539 U.S. at 120 (emphasis original).[2]

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[2] Respondent asserts in a footnote, without citing any authority, that any review of the merits of a prisoner's federal claim would be "dependent" upon review of the state-court rule allowing the petitioner to bring the claim in the first place. Resp.

At bottom, respondent's concern seems to be that, in some cases, Federal constitutional issues may escape this Court's attention. This happens every day. State courts handle some 20 million criminal cases every year. Resp. Brief at 19. This Court accepts review of a small fraction of them. Thus, it is an understatement to say that the overwhelming majority of Federal constitutional issues are resolved in the state courts with no review from this Court. *Cf. ASARCO*, 490 U.S. at 636 (Rehnquist, C.J., concurring in part and dissenting in part) (describing as "unremarkable" the possibility that "state courts will [be] free to decide important questions of federal statutory and constitutional law without the possibility of review in this Court"). The impact of a state court's decision on a Federal constitutional issue is limited to that state alone. *Id.* And, if the issue is important enough, this Court will eventually have the opportunity to consider it via a case on direct review.

Confirming for the state courts their ability to fully adjudicate the merits of Federal constitutional claims raised by state prisoners will not hamper this Court's ability to consider important Federal constitutional issues.

III. PETITIONER SEEKS TO USE STATE LAW, NOT FEDERAL LAW, TO ALLOW THE STATE COURT TO CONSIDER THE FULL MERITS OF HIS FEDERAL CONSTITUTIONAL CLAIM.

Respondent repeatedly contends that if state courts do not have to adopt the *Teague* rule in state post-

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Brief at 23 n. 11. Respondent is wrong and *Hicks* and *ASARCO* demonstrate as much.

conviction proceedings, the state courts will "create preferred federal constitutional rights." Resp. Brief at 6, 7, 9, 16, 24, 25. Nothing of the sort will occur. The question is whether federal law prohibits state courts or state legislatures from using state law to open the state courthouse door to state prisoners who are attempting to challenge their state-court convictions on Federal constitutional grounds. Any broader retroactivity standard used in state court is a creature of state, not federal, law.

Because any non-*Teague* retroactivity standard used in state court would be based upon state law, this Court need not concern itself with how its various permutations might appear. State courts could properly employ each of the standards suggested by respondent at page 20 of its brief as long as the state court satisfies the "clear statement rule," *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), and makes plain that its decision to apply a new rule to an otherwise final case was based upon state law. In such a situation, federal law would not change at all. As long as the state court afforded the prisoner as much protection as federal law requires, such as following any applicable *Teague* exceptions, then the state court would not run afoul of federal law.

Respondent correctly recognizes that this case concerns the difference between what federal law does and does not require and what federal law does and does not allow. Respondent states the following:

> In *Griffith* and *Teague*, this Court was asked to decide whether the defendants were entitled to the benefit of new federal constitutional rulings.

Resp. Brief at 8. Griffith was entitled to the benefit of a new federal constitutional ruling and all other similarly situated defendants – those whose cases are

pending on direct review when the new rule is announced – are similarly so entitled. Teague, on the other hand, was not entitled to the benefit of a new federal constitutional ruling, and no similarly situated defendant is so entitled either. But this Court did not forbid a state court on state postconviction review from affording other defendants in Teague's position the benefit of new rules if the state court saw fit to do so.

As respondent says,

> If a state court deviates from *Teague*, it grants relief that is not required under federal law and is inconsistent with the federal and state interests identified by Justice Harlan and in *Griffith*, *Teague*, and their progeny.

Resp. Brief at 31. This passage illustrates the limited nature of the *Teague* rule. It is a procedural defense that, if properly invoked by the State in a habeas case, limits what claims can be brought in that particular forum. *Beard v. Banks*, 542 U.S. 406, 412-13 (2004) (the *Teague* rule "acts as a limitation on the power of federal courts to grant habeas corpus relief to...state prisoner[s]"). But any state court or legislature that chooses not to provide that defense to the State (as party to the litigation) simply makes a policy decision to provide extra protections to its state prisoners. This is the state court's or state legislature's right, and it is how our federalism works.

Finally, it is axiomatic that respondent's argument that applying the holding of *Crawford* to petitioner's case would somehow violate the Confrontation Clause itself is incorrect. "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson v. New Jersey*, 384 U.S. 719, 728

(1966). In other words, the Sixth Amendment itself is silent on whether or not the state postconviction court can consider petitioner's claim under *Crawford*. *See* ACLU Brief at 22-24. The only bars to such consideration in state court are whatever procedural rules the state court or state legislature determine to be appropriate.

IV. RESPONDENT'S ARGUMENTS PERPETUATE THE MINNESOTA SUPREME COURT'S CONFUSION BETWEEN DECISIONS ANNOUNCING CONSTITUTIONAL REQUIREMENTS AND DECISIONS ANNOUNCING PRUDENTIAL LIMITATIONS UPON FEDERAL COURTS.

Respondent's argument rests upon a fundamentally flawed position: it links the holding of *Teague* to the holding of *Griffith v. Kentucky*, 479 U.S. 314 (1987), and proceeds to the simplistic conclusion that because state courts are required to follow the holdings of the latter, they are required to follow the holding of the former. Resp. Brief at 6, 15, 16. This requirement, posits respondent, stems from some previously unrecognized "federal authority." Resp. Brief at 36.

But *Griffith* and *Teague* could not be more different. *Griffith* was a constitutional decision requiring all courts, state and federal, to apply new federal constitutional rules to criminal cases pending on direct review when the new rule is announced. *Griffith*, 479 U.S. at 317-23. The Constitution forbids state courts or legislatures from placing "selective temporal barriers to the application of" new constitutional rules when federal law requires such application. *Harper v. Virginia Dept. of Taxation*, 508 U.S. 86, 97 (1993) (discussing rationale behind

Griffith); *see also Id.* at 100 (holding that, while state courts may "limit the retroactive application of their own interpretations of state law," they may not similarly limit the application of federal law). *Griffith* set the floor. *See* Pet. Brief at 17-19.

Teague, on the other hand, is about what federal law does not require. *Teague* informs state courts that nothing in federal law, constitutional or otherwise, requires the application of new constitutional rules to cases that became final before the rule was announced, unless the new rule fits into *Teague*'s exceptions. *See Teague*, 489 U.S. at 316 (holdings falling into *Teague*'s exceptions "would be applied retroactively to all defendants on collateral review") (emphasis original).[3] But *Teague* does not discuss, let alone limit, a state court's ability to choose to apply such a holding under state law. In other words, *Teague* did not set a ceiling on the state courts' ability to review Federal constitutional claims.[4]

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[3] The *Teague* exceptions, like the *Griffith* rule, are grounded in the Federal constitutional requirement that trials be "fundamentally fair." *Teague*, 489 U.S. at 311-12 (quoting *Mackey v. United States*, 401 U.S. 667, 693-94 (1971) (Harlan, J., concurring in part and dissenting in part)). The "watershed rule" exception lies only for such rules of "basic due process." *Teague*, 489 U.S. at 313. Any decision of this Court announcing that certain conduct was beyond the ability of the Government to prosecute or that a procedural rule was one of basic due process without which a trial is rendered fundamentally unfair would apply to "all defendants." *Teague*, 489 U.S. at 316 (emphasis original).

[4] *Amici* Alaska, et al., claim that Justice Harlan's policy views on retroactive application of new rules drew no distinction between federal habeas-corpus review and state postconviction review. Alaska Brief at 7-8. This is misleading. While Justice Harlan drew no distinction between federal and state prisoners

V. NEITHER RESPONDENT NOR ITS *AMICI* DEMONSTRATE A SOURCE OF AUTHORITY FOR THIS COURT TO REQUIRE STATE COURTS TO USE THE *TEAGUE* STANDARD.

One of the central issues in this case is under what authority could this Court require state courts to use the *Teague* standard exclusively to determine whether a state-court defendant, who challenges his conviction in state court under a state's postconviction-review process, is able to benefit from a federal constitutional ruling. Respondent presents no answer to this question. It relies upon some kind of oblique, general, amorphous "federal authority" that is supposedly "binding" on state courts. Resp. Brief at 17, 18, 30, 36. But respondent does not, or cannot, identify the source of that authority. Instead, respondent simply throws its hands in the air and posits that the authority is "without a label." Resp. Brief at 36. In our system, in which "[t]he Federal Government's powers are limited and enumerated," there are no such authorities. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting); *see also Alden v. Maine*, 527 U.S. 706, 739 (1999) ("The Federal Government... 'can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.'") (quoting *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326, 4 L.Ed. 97 (1816)).

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petitioning for federal court review of their convictions, *Mackey*, 401 U.S. at 681 n. 1 (Harlan, J., concurring in part and dissenting in part), he did not discuss the differences between collateral review in state and federal court.

Respondent's mostly unstated implication is that its proposed source of authority for the *Teague* rule is the Federal Constitution.[5] Respondent is alone in this position, and it is wrong. *See* Pet. Brief at 15; NACDL Brief at 19-25; ACLU Brief at 5-10; Kansas Brief at 14-16; Alaska Brief at 9, 19, 29-30 (discussing why the *Teague* rule is not a constitutional command). The *Teague* rule is not a constitutional command. It is simply one of the "prudential" rules – rules based upon "equity and federalism" – which this Court has promulgated to limit a federal habeas court's ability to review a state-court conviction. *Withrow v. Williams*, 507 U.S. 680, 688-89 (1993) (O'Connor, J., concurring in part and dissenting in part) (quoting *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part) (listing some such rules, including that announced in *Stone v. Powell*, 428 U.S. 465 (1976), and that announced in *Teague*); *see also Withrow*, 507 U.S. at 717-18 (Scalia, J., concurring in part and dissenting in part) (describing *Teague* rule as an "equitable," "gateway[]" claim "grounded in the 'equitable discretion of habeas courts.'") (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). This Court grounds such rules either in its interpretation of the federal habeas corpus statutes or by exercising its supervisory authority over the lower federal courts. Neither source of authority controls state-court procedures.

Respondent claims there is "no textual support" for the *Teague* rule in the federal habeas statues. Resp.

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[5] The contention is only mostly unstated. In a footnote near the end of its brief, respondent appears to make plain its position. Resp. Brief at 30 n. 15 ("*Teague*, like many other constitutional provisions, is subject to waiver by a party.") (emphasis added).

Brief at 16. This Court, to the contrary, has found such support for prudential rules limiting the availability of habeas corpus, including the *Teague* rule, in 28 U.S.C. § 2243, which authorizes a habeas court to "dispose of the matter as law and justice require." (emphasis added). *Withrow*, 507 U.S. at 686; *see also Id.* at 699 (O'Connor, J., concurring in part and dissenting in part) (prudential doctrines, including *Teague* rule, are grounded in "the express language of the habeas statute") (citing 28 U.S.C. § 2243).

Respondent relies upon language in *Teague* discussing "collateral review" and uses this as evidence to support its position that the Court always intended the *Teague* rule to govern in state-court postconviction proceedings. Resp. Brief at 12-13 n. 7. But the cases cited by respondent involve a single procedural posture: federal habeas corpus review of a state-court conviction. *See, e.g., Wright v. West*, 505 U.S. 277, 309 (1992) ("*Teague* gives substantial assurance that habeas proceedings will not use a new rule to upset a state conviction.") (Kennedy, J., concurring) (emphasis added).

Amici Alaska, et al., concede that the *Teague* rule does not have its origins in the Constitution. Alaska Brief at 9, 19, 29-30. They posit that the rule is one of federal common law. Alaska Brief at 9-20. This is theoretically possible but unlikely. There is no federal common law in the vast majority of situations. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71-80 (1938). This Court only promulgates federal common law to govern a particular situation in the absence of congressional action. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) (citations omitted). Congress has, to put it mildly, regulated the extent, availability, and rules surrounding fed-

eral habeas corpus relief, including the availability of federal habeas for state prisoners, and has done so for more than one hundred years. The Court does not insert federal common law into an area in which Congress has so authoritatively regulated. *See City of Milwaukee*, 451 U.S. at 313 (federal common law only applies "[w]hen Congress has not spoken to a particular issue") (citations omitted).

But concluding that *Teague* is a federal common-law rule is one thing. Accepting the radical proposition that it preempts the rules of procedure in every state court in the country is quite another. *Amici*, tellingly, do not analyze this aspect of the issue. They seem to assume that if *Teague* is a common-law rule it *ipso facto* preempts all contrary state laws.[6] Alaska Brief at 11, 16-17. For several reasons, the Court should reject this unwarranted, radical expansion of federal power.

First, it is not at all clear whether the Federal government has the constitutional authority to preempt state-court rules of procedure unless necessary to protect the Federal constitutional rights of litigants. *See Jinks v. Richland County*, 538 U.S. 456, 465 (2003). Here, *amici* asks the Court to preempt state law and require the States to deny to their citizens the full protections of the Federal Constitution.

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[6] *Amici* acknowledge that, ordinarily, "each sovereign is free to apply its own rules of procedure when applying the other sovereign's substantive law and that the federal government does not attempt to control procedure in state court (except where explicitly required by the Federal Constitution, such as by the Due Process Clause)." Alaska Brief at 16. *Amici* then contend, without support, that the rule "should" be different in this situation. *Id.* at 17.

Second, even if a federal common-law procedural rule could theoretically preempt a state-court procedural rule, such action would be inappropriate here. As the Court has observed:

> [t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.

Howlett v. Rose, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) (internal quotations and other citations omitted)). To say, therefore, that there is a presumption against preemption would be an understatement. Preemption only would be proper to protect some vitally important federal interest in a situation where the States' interests are minimal. Here, the opposite is true. The Federal interests in forcing the state courts to use a particular procedural rule are almost nonexistent.

Amici settle upon "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity."[7] *O'Melveny & Myers v. Fed. Deposit Insurance Corp.*, 512 U.S. 79, 88 (1994). But in collateral review of state-court criminal convictions, the Federal government, through Congress, has adopted the opposite goal. Habeas relief no longer lies to ensure the uniform interpretation of federal law by state courts. Instead, at least since the 1996 passage of the Antiterrorism and Effective Death

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[7] Our federal system is traditionally accepted as inherently non-uniform. Respondent's criticism of non-uniformity is a quarrel with our federal system not with petitioner's well-founded claim.

Penalty Act (AEDPA), the purpose of federal habeas review of state-court cases is simply to determine whether state court's decision was, in some way, reasonable. *See* 28 U.S.C. § 2254(d)(1) (1994 ed. Supp. III) (providing that writ shall not issue unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law"); *see also Schriro v. Landrigan*, 127 S.Ct. 1933, 1939 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable") (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). Congress has thus provided that habeas relief should not be granted just because a state-court decision is, in some way, wrong. Instead, regardless of whether the result is "right," "wrong," or uniform with results reached by other courts in similar situations, the state court need only act reasonably in order to protect its judgment from being upset by a federal court. Different state courts might reach different decisions on similar issues of federal law, with each such decision being reasonable, and each such decision thus not subject to vacation by a habeas court. *See Yarborough v. Alvarado*, 541 U.S. 652, 663-64 (2004) (noting that different courts may reach different, albeit reasonable, results in similar cases especially when applying a general legal standard) (citing, inter alia, *West*, 505 U.S. at 308-09 (Kennedy, J., concurring)). Far from discouraging non-uniformity in state court rulings on Federal constitutional issues, as respondent claims, Congress has expressly endorsed it.[8]

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[8] Long before AEDPA, this Court endorsed similar non-uniformity of results when it held that state prisoners may not raise Fourth Amendment claims on Federal habeas, as long as

On the other hand, the States' interest in controlling access to their courts, and in vindicating the Federal constitutional rights of their citizens, is paramount. This Court has "made it quite clear that it is a matter for each State to decide how to structure its judicial system." *Johnson v. Fankell*, 520 U.S. 911, 922 n. 13 (1997) (citations omitted); *Howlett*, 496 U.S. at 372 ("The States . . . have great latitude to establish the structure and jurisdiction of their own courts.").

Johnson is instructive. There, the Court considered a claim by Idaho state officials that *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), interpreting 28 U.S.C. § 1291 to allow for an interlocutory appeal by defendants in a suit pressed in federal court under 42 U.S.C. § 1983, preempted an Idaho state-court rule disallowing such appeals in state court. *Johnson*, 520 U.S. at 914, 919-20. The Idaho officials claimed that preemption was necessary "to avoid 'different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court.'" *Id.* at 919 (citation omitted). This is nearly identical to the claim made by respondent – that *Teague* must govern in state court lest state courts hear federal constitutional claims that no federal court could hear. Resp. Brief at 22-23.

The Court rejected the Idaho officials' claim in *Johnson* and it should do the same with the claim here. The *Johnson* Court recognized that "the pur-

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the state court had provided the prisoner with a full and fair opportunity to litigate the issue in state court. *Stone*, 428 U.S. at 494-95. Thus, even if the state court's decision on the Fourth Amendment issue is unreasonable – indeed, even if it is flat wrong and contrary to every other decision on similar facts from other courts around the country – habeas relief will not lie.

pose of qualified immunity is to protect the State and its officials from overenforcement of federal rights." *Johnson*, 520 U.S. at 919. Therefore, the Idaho courts' refusal to allow an interlocutory appeal on the issue was "less an interference with federal interests than a judgment about how best to balance the competing state interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense." *Id.* at 919-20 (emphasis original). In other words, the State of Idaho chose not to avail itself of the full protections of Federal law, and that was the State's choice to make.

The same is true here. A State's decision not to use the *Teague* procedural-bar rule in its collateral-review proceedings does not upset any federal interests. The *Teague* rule "is a federal procedural right that simply does not apply in a nonfederal forum" unless the nonfederal forum chooses to adopt it. *Johnson*, 520 U.S. at 921. The answer to the question of whether or not to do so is a policy judgment about how best to balance the competing state interests in finality of convictions and those of affording state prisoners a forum to challenge their convictions on the basis of alleged Federal Constitutional errors. *See* Pet. Brief at 24-27. Like the interlocutory-appeal rule at issue in *Johnson*, the *Teague* rule was designed to prevent overenforcement of federal rights in federal court. *See West*, 505 U.S. at 308 (Kennedy, J., concurring) (describing the purpose of *Teague* as to not "subject" state-court convictions to federal review under "ever changing" federal law); *Teague*, 489 U.S. at 310 (without *Teague* rule, States are "force[d] . . . to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards"). But if a state court or a state legislature determines that it is

in its best interests to forgo *Teague*'s protections in its own courts – in other words, if a state court chooses to subject itself to ever-changing federal law – it should be permitted to do so.[9] No one, in that situation, would be forcing the State to do anything.

VI. THE RESULT POSITED BY *AMICI* KANSAS, ET AL., IS CORRECT. THE BASIS FOR ACHIEVING THAT RESULT, HOWEVER, IS WRONG.

Amici Kansas, et al., agree with petitioner that the Minnesota Supreme Court erred and that state courts are not required to use the *Teague* standard to determine whether to apply new rules of federal constitutional criminal procedure to cases pending on state-court collateral review. Kansas Brief at 4, 18. But Kansas claims that not only are state courts free to ignore *Teague*, they are free to ignore all federal due-process requirements when considering cases on collateral review. Kansas Brief at 7-10.

Specifically, Kansas claims for itself the authority to "decline to recognize retroactivity at all." Kansas Brief at 9. If this is true, then *Yates v. Aiken*, 484 U.S. 211, 215-17 (1988), was wrongly decided. In *Yates*, this Court made plain that state courts, including those reviewing criminal cases on postconviction review, are obligated to apply Federal constitutional decisions retroactively if federal law so requires. *Id.* Kansas' radical position cannot be squared with the holding in *Yates*. *Cf. Halbert v.*

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[9] After all, a State's executive branch is free to forgo *Teague*'s protections even when litigating in Federal habeas corpus, the very forum for which *Teague* was designed. *Youngblood*, 497 U.S. at 41. The co-equal legislative and judicial branches of state government should be afforded the same respect.

Michigan, 545 U.S. 605, 610-24 (2005) (recognizing that States have no constitutional obligation to provide a right to an appeal, but holding if a State does provide such a right, the Due Process Clause requires appointment of counsel for indigent defendants).

CONCLUSION

This Court should reverse the judgment of the Minnesota Supreme Court and remand this case to that court for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STEPHEN DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF *AMICUS CURIAE* OF THE STATES OF ALASKA, COLORADO, DELAWARE, FLORIDA, HAWAII, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, OREGON, SOUTH DAKOTA, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Teague v. Lane, 489 U.S. 288, 310-14 (1989), held that a new rule of criminal procedure based on the Federal Constitution does not apply retroactively when a prisoner collaterally attacks his conviction or sentence unless it constitutes a "watershed" rule, *i.e.*, a rule without which the accuracy of the fact-finding process is "seriously diminished" and which constitutes a "bedrock" procedural requirement.

Alaska and its sister *amici* states provide procedures to collaterally attack convictions and sentences. When a prisoner's collateral attack is based on a new rule of federal constitutional law that issued after the prisoner's conviction became final, *amici* have an interest in applying a predictable, uniform federal standard rather than being subjected to the fluctuating retroactivity standards of 50 individual states. *Amici* also have an interest in application of the *Teague* standard because it protects convictions that have become final. Finally, because a *Teague* non-retroactivity defense may be waived by a state, *Teague* also gives states litigation flexibility by allowing them to address the merits of a claim when appropriate.

SUMMARY OF ARGUMENT

The history of *Teague* (including both the specific case law on which it is based and its place within the Court's retroactivity jurisprudence) and *Teague*'s language show that it set a general retroactivity standard for cases on collateral review, not merely a rule applicable only to federal habeas cases involving state prisoners. *Teague* relied on opinions of Justice Harlan which stressed the need to have different retroactivity standards for direct and collateral review and which used examples that defined "collateral review" in expansive terms, to include federal prisoner petitions under 28 U.S.C. § 2255 and state-court collateral review. *Teague* similarly relied on a distinction between direct and collateral review and used additional examples that included state-court

collateral review within the meaning of "collateral review." *Teague* also relied on concerns that are of equal applicability in both state-court and federal collateral review, such as finality and equal treatment of similarly situated litigants.

The *Teague* Court was justified in believing that it had authority to formulate a retroactivity standard governing collateral review in both state and federal court. As to the latter, *Teague* is doubtless based in part on the Court's equitable powers regarding federal habeas actions. However, *Teague* is supported by more than just the Court's equitable powers. Rather, the Court also had authority to make *Teague* binding in state court because it meets the criteria for being a federal common-law rule. Under Danforth's view, a state post-conviction relief court could apply a new constitutional rule announced by this Court retroactively even though it would not be retroactive under *Teague*. If the state court construed the new rule erroneously and the prisoner sought federal review, the conflicts created show why *Teague* must be treated as a binding federal common-law rule.

Three primary criteria must be met to warrant the adoption of a federal common-law rule—there must be unique federal interests at stake, a basis of authority or warrant for creating the rule, and a conflict between state and federal law. *Teague* meets all three criteria.

First, there are unique federal interests at stake that inhere in the power of this Court and lower federal courts to review state collateral review proceedings, either via direct or habeas review. These federal interests include (1) the federal courts' resources, (2) remaining as the final forum for interpreting the Federal Constitution, and (3) preserving the integrity of federal review by ensuring that similarly situated litigants are treated equally. There is also a federal interest in the temporal scope of new federal constitutional rules.

Second, there is a warrant for the adoption of retroactivity standards for federal constitutional rules and sources of

authority that this law is anchored to. The power to set retroactivity standards is an inherent aspect of sovereignty retained by the federal government as part of the legislative and judicial powers granted by Articles I and III of the Federal Constitution. This Court's power of direct review and federal courts' habeas jurisdiction give federal courts a strong interest in setting rules integral to the exercise of such review. Federal courts also have the authority to interpret and enforce federal constitutional rights. Necessity also provides a basis for enforcing federal retroactivity standards when federal constitutional rules are at issue in state court, in order to prevent this Court's retroactivity decisions from being rendered ineffectual by state courts.

Third, there would be substantial conflicts between state and federal law if states could apply their own retroactivity standards and ignore *Teague*. If a state court in a collateral review action erroneously interpreted one of this Court's precedents and the case was then brought before this Court on appeal or a district court in a habeas action, the reviewing federal courts would face the dilemma of either jettisoning *Teague* to correct the federal constitutional error or adhering to *Teague* and leaving the error uncorrected.

Requiring state courts to apply a federal retroactivity standard when evaluating the retroactivity of a rule based on the Federal Constitution is fully consonant with principles of federalism. States remain free to set their own retroactivity standards for rules based on state law. If a state supreme court finds a new federal constitutional rule compelling it can adopt the rule as a matter of state law and then apply state retroactivity standards to it. State legislatures and courts likewise retain control over retroactivity standards for state statutes and state appellate decisions based on state law.

Finally, the Minnesota Supreme Court's position in *Danforth*—that *Teague* is binding in state-court collateral review—is one shared by a number of states. And while some states believe they are not bound by *Teague*, the majority of

states nonetheless follow *Teague*. Accordingly, affirming *Danforth* will work no disruption to the fabric of the law. By contrast, the rationales underlying the arguments of Danforth and supporting *amici* would fatally undermine several of this Court's significant precedents.

ARGUMENT

I. THE HISTORY, NATURE, AND LANGUAGE OF *TEAGUE* SHOW THAT IT ANNOUNCED A GENERAL RETROACTIVITY STANDARD FOR COLLATERAL REVIEW, NOT SIMPLY A HABEAS RULE

This Court's holding in *Teague*, that new rules of criminal procedure based on the Federal Constitution do not apply retroactively, with exception for "watershed" rules, was one of the most significant precedents in the Court's retroactivity jurisprudence.[1] The Court's retroactivity case law developed over a 30-year period and the jurisprudential considerations that impacted individual justices' views apply in multiple settings and are not cabined within the individual categories of civil, criminal, or habeas cases. This case law, *Teague*'s placement within it, and *Teague*'s language show that *Teague* should not be viewed simply as a rule for habeas cases but rather as a general retroactivity standard.

In *Great Northern Railway Co. v. Sunburst Oil*, 287 U.S. 358, 364 (1932), the Court recognized that the Federal Constitution does not compel states to adopt any particular retroactivity standard for cases arising under state law. Aside from that pronouncement, the Court's retroactivity juris-

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[1] Danforth frames the question presented as whether *Teague* applies to United States Supreme Court decisions. Pet.Br. at i. However, this Court and state appellate courts have also correctly applied *Teague* to evaluating retroactivity of new federal constitutional rules announced by lower federal and state appellate courts. *See, e.g., Gilmore v. Taylor*, 508 U.S. 333, 335-46 (1993); *Carter v. Johnson*, 599 S.E.2d 170, 171-73 (Ga. 2004); *State v. Egelhoff*, 900 P.2d 260, 267 (Mont. 1990).

prudence remained relatively static until *Linkletter v. Walker*, 381 U.S. 618 (1965). *Linkletter* was a federal habeas case involving the retroactivity of *Mapp v. Ohio*, 367 U.S. 643 (1961). Abandoning the longstanding English and American view that judicial decisions apply retroactively, the Court instead adopted a three-factor test for evaluating the retroactivity of new federal constitutional rules in criminal and habeas cases. *Linkletter*, 381 U.S. at 622-29. That test looked at the purposes of the new rule, the extent to which law enforcement and courts reasonably relied on the old rule, and the effect on the administration of justice caused by retroactive application of the new rule. *Id.* at 629. Under the *Linkletter* test courts had a number of options regarding retroactivity, ranging from making a rule completely retroactive, completely prospective, or gradations in between (such as not applying the new rule to the parties before the court but applying it to all cases occurring after a fixed date). The Court applied *Linkletter* to both criminal and habeas cases for over 20 years.[2] The Court also adopted a standard similar to *Linkletter* for evaluating retroactivity in civil cases, in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-07 (1971).

The *Linkletter* test came under increasing attack from courts and academic commentators over the years. In 1987 the Court finally scrapped *Linkletter* for criminal cases and returned to the pre-*Linkletter* standard, in *Griffith v. Kentucky*, 479 U.S. 314 (1987). The Court held that "a new rule [constitutional] rule for the conduct of criminal prosecutions

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[2] Significantly, the Court applied *Linkletter* to cases arising on state collateral review a number of times. *See Kitchens v. Smith*, 401 U.S. 847, 848 (1971); *McConnell v. Rhay*, 393 U.S. 2, 3 (1968); *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968); *DeStefano v. Woods*, 392 U.S. 631, 632-35 (1968); *Witherspoon v. Illinois*, 391 U.S. 510, 513, 523 n.22 (1968); *Johnson v. New Jersey*, 384 U.S. 719, 726-35 (1966). As seen in the text below, *Teague*'s language shows that the Court meant to continue applying the Court's retroactivity jurisprudence to state collateral review.

is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" *Id.* at 328.

Linkletter's civil counterpart, *Chevron Oil*, also came under attack over the years, particularly in *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Those opinions were divided, however, and no position garnered a majority until the Court decided *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993), where it adopted the same standard as *Griffith* in the civil context.

Teague, which was decided between *Griffith* and *Harper*, represents the adoption of Justice Harlan's views on retroactivity in the specific context of collateral review. Justice Harlan articulated the position that there should be different standards for when a prisoner seeks retroactive application of a new rule of criminal law on collateral (as opposed to direct) review of his conviction in *Desist v. United States*, 394 U.S. 244, 260-69 (1968) (Harlan, J., dissenting), and in *Mackey v. United States*, 401 U.S. 667, 681-95 (1971) (Harlan, J., concurring in part and dissenting in part). In 1988, in *Yates v. Aiken*, 484 U.S. 211, 215-17 (1988), the Court noted that Justice Harlan's views had been gaining increasing favor, but found it unnecessary to create a new retroactivity standard for collateral review. By 1989, Justice O'Connor, who had previously taken the opposite position in dissent in *Griffith v. Kentucky*, 479 U.S. at 329-33, also embraced the Harlan view, and a four-justice plurality was able to formulate a new retroactivity standard for collateral review in *Teague*. That standard was adopted by a majority of the court within the year. *See Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

Teague involved federal habeas review, but *Teague*'s reliance on prior criminal retroactivity case law and the Court's later discussion of *Teague* in civil retroactivity case law suggest that its reasoning extends beyond the confines of habeas. *Teague* itself contains multiple indicia that it set a

general retroactivity standard for all forms of collateral review of criminal matters, not just a habeas rule.

First, *Teague* was based primarily on Justice Harlan's concurrence in *Mackey*. *Teague*, 489 U.S. at 306-13. Justice Harlan had urged courts to focus on the general procedural context in which retroactivity claims are raised, stating that they should look to the "nature, function, and scope of the adjudicatory process in which such cases arise." *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part). He stated, "The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the writ of habeas corpus is made available." *Id.* This latter sentence is often seized upon to claim that Justice Harlan was speaking only of federal habeas corpus for state prisoners, *see, e.g.*, *Smart v. State*, 146 P.3d 15, 21 (Alaska App. 2006), but the opinion shows this not to be the case. *Mackey* combined several cases, one involving a *federal* prisoner, Elkanich, attacking his conviction under 28 U.S.C. § 2255.[3] *Mackey*, 401 U.S. at 649. Justice Harlan stated, "As I do not propose to make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief, I shall refer throughout this opinion to both procedures as the writ of habeas corpus, and cases before us involving such judgments as cases here on collateral review." *Id.* at 681 n.1 (Harlan, J., concurring in part and dissenting in part). His opinion also showed that he viewed "collateral review" as encompassing not only *federal* but also *state* collateral review. He noted that he believed that the new rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which came to the Court on certiorari from a state-court collateral review case, was properly given retroactive application in that case. *Mackey*, 401 U.S. at 694

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[3] Federal courts apply *Teague* to review of federal convictions in § 2255 actions. *See United States v. Price*, 400 F.3d 844, 845-49 (10th Cir. 2005); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998).

(Harlan, J., concurring in part and dissenting in part). Justice Harlan's entire discussion in *Mackey* shows that his conception of "collateral review" was not focused solely on federal habeas cases involving state prisoners but rather was more general and encompassed all forms of collateral review in criminal matters.

Second, *Teague* distinguished generally between "direct review" and "collateral review" or "collateral attack," rather than between direct review and federal habeas review. *Teague*, 489 U.S. at 303, 305-07, 309-11, 316. *Teague* referred to *Yates v. Aiken*, 484 U.S. 211 (1988), a state-court collateral review case, as "collateral review," as it also did *Pennsylvania v. Finley*, 481 U.S. 551 (1987), which involved a state post-conviction relief action. *Teague*, 489 U.S. at 307. Justice Stevens' concurrence likewise framed the matter in terms of the direct-collateral distinction. *Id.* at 318-19, 321 (Stevens, J., concurring).

Third, though *Teague* partially relied on federal-state comity considerations, the Court also referred to other concerns that show that *Teague* was broader than the habeas context. *Teague* referred repeatedly to the need for finality of criminal convictions. *Teague*, 489 U.S. at 308-10. Finality is a concern regardless of whether a conviction is attacked in state or federal court, and is independent from comity concerns. This Court observed in *Beard v. Banks*, 542 U.S. 406, 413 (2004), "*Teague* . . . protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." *Teague* also referred to the need for equal treatment of litigants, 489 U.S. at 302-05, 315-16, another concern that applies with equal force to collateral attacks in both state and federal court.

Thus, as seen in the foregoing discussion, the history of *Teague* and the opinion itself both make clear that it set forth a general retroactivity standard for collateral review cases, not simply a standard for habeas cases. Danforth and various *amici* claim that this is not so, however, arguing that *Teague*

is really more limited, and that the standard it announced is properly viewed as a choice-of-law rule or part of the law of remedies. Pet.Br. at 20-21, 32; National Association of Criminal Defense Lawyers ("NACDL") Brief at 22-29. The argument appears at first to be supported by the views of some justices. Justice Stevens' dissent in *American Trucking* discussed retroactivity as an aspect of choice-of-law and of remedies. *American Trucking*, 496 U.S. at 209-24 (Stevens, J., dissenting). The plurality opinion in *James B. Beam Distilling Co.* was in accord. *Beam*, 501 U.S. at 534-35 (Stevens, J., joined by Souter, J.). But this view was rejected by the plurality opinion in *American Trucking*, 496 U.S. at 189 and 194. More importantly, Justices Stevens and Souter joined the majority in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752-59 (1995), which recognized that retroactivity is not a remedial principle (though remedial principles may in certain circumstances bear upon the relief achieved, for reasons explained by Justice Breyer).

Similarly, as to the view that *Teague* is only a habeas rule, premised on considerations of federal-state comity, Justice Kennedy stated, "it would be a misreading of *Teague* to interpret it as resting on the necessity to defer to state-court determinations. *Teague* did not establish a deferential standard of review of state-court decisions of federal law. It established instead a principle of retroactivity." *Wright v. West*, 505 U.S. 277, 307 (1992) (Kennedy, J., concurring).

II. THIS COURT'S AUTHORITY TO ANNOUNCE FEDERAL COMMON-LAW RULES PERMITTED MAKING *TEAGUE* BINDING IN STATE-COURT COLLATERAL REVIEW

A. Introduction

As seen in the previous section, this Court described *Teague* in terms that encompass collateral review of a criminal conviction in both federal and state court. As to the former, the Court's authority to do so doubtless stems in part

from its equitable powers regarding federal habeas for state prisoners, as conferred by 28 U.S.C. § 2243. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 714-18 (1993) (Scalia, J., concurring in part and dissenting in part, joined by Thomas, J.) (discussing case law). But the Court's authority to do so also derived from additional sources that permitted it to extend the rule to state-court proceedings. Specifically, *Teague* is properly viewed as a rule of federal common law.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 71-80 (1938), overruled precedent that permitted federal courts in diversity actions to develop a general federal common law, but the Court did not eliminate the ability of federal courts to create federal common law. The same day *Erie* was decided, the Court upheld its authority to create federal common law in *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), finding that it provided a basis for adjudicating an interstate water-rights dispute. Post-*Erie* the Court has continued to sanction the development of federal common law in a more limited and focused manner. Retroactivity standards for federal rules applied in state-court collateral review is an area where this is appropriate.

B. Criteria for Federal Common-Law Rules

It is difficult to devise a single formula that encompasses all the criteria for when it is appropriate to fashion a federal common-law rule. "[T]he governing principles [are] amorphous" and "there is no platonic essence of federal common law with concomitantly obvious conceptual categories that are easy to apply." C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4514, at 452 (2d ed. 1996) ("Wright & Miller"). "To some extent, each exercise of federal common lawmaking is sui generis in that it is the product of the unique interplay of specific statutory or constitutional language, case-sensitive policy concerns, and other case-specific factors." *Id.* at 462. Still, two categorical observations can be made.

First, this Court has authority to formulate federal common-law rules that are binding in state courts through the Supremacy Clause. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964).

Second, retroactivity standards may be adopted as federal common-law rules, as seen by decisions where the Court has described certain federal retroactivity standards as binding on the states under the Supremacy Clause. *See American Trucking*, 496 U.S. at 177-78; *Harper*, 509 U.S. at 100 ("The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law"). The Supremacy Clause by its terms makes the Federal Constitution, federal statutes, and treaties the supreme law of the land. As seen in *Sabbatino*, this Court has added a fourth category of authority that can be binding on the states, federal common law. The power of federal retroactivity analysis to bind the states does not stem from any of the first three sources of federal law. The Federal Constitution does not require state courts to apply a particular retroactivity standard to judicial decisions. No federal statute speaks to the issue of whether state courts are required to apply any particular retroactivity standard to such rulings, nor does any treaty. Thus *American Trucking* and *Harper* can only mean, when they say that certain federal retroactivity standards are binding in state court, that those standards are federal common law.

Beyond those categorical observations, three major principles guide the inquiry here. All of them must ultimately be viewed through the lens of federalism.

First, federal common law is only appropriate where there are unique federal interests at stake. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). The federal interest may come from the need to enforce specific provisions of the Federal Constitution. *See Bush v. Lucas*, 462 U.S. 367, 374 & n.12 (1983).

Second, "federal courts must possess some federal-common-law-making authority before undertaking to craft it." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring, joined by Rehnquist, C.J., and Thomas, J.). This principle looks to the Court's warrant or justification for adopting a federal common-law rule. It may stem from (1) the fact that the Court is adjudicating the meaning of a constitutional provision, (2) in some limited situations, a constitutional or statutory grant of jurisdiction over cases in a particular area, or (3) tradition or necessity.[4]

Third, there needs to be genuine conflict between federal and state law to warrant adopting federal common law. *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997). The need for such conflict is most pronounced in statutory preemption cases; courts will not develop federal common law to fill in gaps in a federal statutory scheme unless there is a clear conflict between state and federal law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988). Outside the statutory preemption context the conflict need not be as dramatic, and "the fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce preemption into one that can." *Id.* at 507-08.

C. Application of the Criteria for Federal Common Law to the Context of Retroactivity on Collateral Review

The *Teague* standard meets all of the criteria set out above for being a federal common-law rule.

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[4] *See Sosa*, 542 U.S. at 742 (grant of admiralty jurisdiction in Federal Constitution); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001) (necessity authorizes federal common law as to preclusive effect of federal court judgments); *Wright & Miller*, § 4514, at 470 ("a significant array of cases involv[e] the employment of federal common law [where] there is a strong national or federal concern originating from the Constitution, from tradition, or from practical necessity").

First, unique federal interests are at stake when a state prisoner collaterally attacks his conviction, seeking retroactive application of a new federal constitutional rule. Because a state court's interpretation of the Federal Constitution in a collateral attack is subject to review by this Court on appeal and by lower federal courts in a habeas petition, retroactive application of new federal rules affects the federal courts' exercise of their review functions. Under Danforth's view, state courts should be able to retroactively apply a ruling that would not be retroactive under *Teague*. If that were so, federal courts would be forced to choose between reviewing the case or applying *Teague*, thus compromising federal court oversight of federal constitutional law. The federal courts' interests in remaining as the ultimate forum for interpretation of the Federal Constitution and in controlling their own judicial resources are thus implicated, as is their interest in the temporal scope of new constitutional rules.[5]

Another significant federal interest, deriving again from this Court's constitutionally granted review powers, is ensuring equal treatment of similarly situated litigants in order to preserve the integrity of judicial review.[6] Under Dan-

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[5] As to the federal courts' interest in remaining as the ultimate expositor of the Federal Constitution, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (citing cases); *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) (Supreme Court must ensure that "state courts will not be the final arbiters of important issues under the federal constitution"). As to the relationship between finality, habeas, and judicial resources, *see McCleskey v. Zant*, 499 U.S. 467, 490-92 (1991).

[6] In holding that new rules apply to all cases pending in the trial court or on direct review, this Court noted that the need for treating similarly situated litigants alike rested on "basic norms of constitutional adjudication" and "the nature of judicial review." *Griffith*, 479 U.S. at 322. *See also Teague*, 489 U.S. at 317 (White, J., concurring) (*Griffith* "appear[s] to have constitutional underpinnings"); *James B. Beam Distilling Co.*, 501 U.S. at 540 (describing *Griffith* as an "equality principle"); *id.* at 547 (Blackmun, J., concurring, joined by Marshall and Scalia, JJ.) (stating that *Griffith*'s rule "derives from the integrity of judicial review" required by

forth's view, if one of this Court's constitutional rulings were not retroactive under *Teague*, the state courts would nonetheless be free to make it retroactive under state-law standards. But this would create disparities between similarly situated litigants. Prisoners in states which granted retroactivity could use the new ruling to attack their convictions, but prisoners in other states and prisoners convicted in federal court could not rely on the new ruling. This disparity would be further compounded by the fact that such practice would result in a rule of federal constitutional law not being subject to uniform national interpretation.

Second, there is a warrant for the adoption of retroactivity standards and sources of authority that retroactivity law is anchored to. At a fundamental level, the power to set retroactivity standards is an inherent aspect of sovereignty that has been incorporated into our constitutional framework. Two inherent sovereign powers are the powers to adjudicate and to legislate. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (adjudication); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (legislation). A concomitant power is the ability to set the temporal scope of new judicial or statutory commands, that is, whether they apply prospectively or retroactively. That this power is an inherent aspect of sovereignty can be seen by looking at retroactivity practice in the Anglo-American tradition when the Constitution was adopted.

As to legislation, statutes passed by Parliament were normally only prospective in effect. *See Landgraf v. USI Film Products*, 511 U.S. 244, 265 & n.17 (1994). But this general principle did not prevent Parliament from expressly providing that a statute was retroactive. *See* E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 778 (1936). The Framers likewise recognized that Congress could also do so,

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the Constitution's grant of authority to review cases and controversies); *Harper*, 509 U.S. at 95.

subject only to the limitations imposed by the prohibitions on *ex post facto* laws, bills of attainder, and impairment of contracts. *See* U.S. Const. art. I, sec. 9, cl.3 and sec. 10, cl.1.

As to judicial decisions, the Blackstonian view that judges discovered rather than made the law was prevalent, and accordingly judicial decisions were almost always retroactive in English practice. But this was not invariably the case. In 1675, only a little over a century prior to the adoption of the Federal Constitution, English chancery practice with its reliance on equitable considerations had approved prospective application of a judicial decision in order to protect a party that had relied on prior law. *See Lord Nottingham's Chancery Cases*, 73 Selden Society 182 (1954) (cited in Justice Roger Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L. J. 533, 567 (1977)). And nineteenth-century American courts, though steeped in the Blackstonian view, nevertheless issued some prospective rulings based on the same reliance concerns as Lord Nottingham. *See, e.g., Gelpcke v. City of Dubuque*, 68 U.S. 175 (1863); *Bingham v. Miller*, 17 Ohio 445 (1848). These early English and American cases show that while the Framers may have thought of prospective judicial rulings as inconsistent with both the English tradition from which they came and the judicial power they created in Article III, they nonetheless would also have, at least in the public international law sense, conceived of the power to set retroactivity standards for judicial decisions as an inherent aspect of sovereignty. As the Court later said regarding the ability of state courts to set retroactivity standards for state law:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.

Great Northern Railway Co., 287 U.S. at 364-65.

Accordingly, the power to set retroactivity standards for both statutes and judicial decisions is properly viewed as an inherent aspect of sovereignty. This power was retained by the United States when the Constitution was adopted, and is an aspect of both the legislative and judicial powers set out in Articles I and III. However, this power to set retroactivity standards was not divided evenly among the legislative and judicial branches. Stated differently, though as a general matter Congress addresses the retroactivity of statutes and the judicial branch addresses the retroactivity of judicial decisions, this is not invariably so. Each branch may play an appropriate role in formulating retroactivity standards for the other. For example, in *Tyler v. Cain*, 533 U.S. 656, 663 n.5 (2001), in discussing the retroactivity standards in 28 U.S.C. § 2244(b)(2)(A) for second or successive federal habeas petitions, this Court stated, "[e]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds." Conversely, in *Landgraf v. USI Film Products*, the Court recognized its authority to set out a general standard for evaluating the retroactivity of statutes that do not expressly address retroactivity. *Landgraf*, 511 U.S. at 263-80.

This inherent power to set retroactivity standards for rules based on federal law is not simply a power to set retroactivity standards *in federal court*. The federal system devised by the Framers contemplated from the outset that the laws of both the United States and individual states would be applied in the courts of the other sovereign; federal courts apply state law in diversity actions, and state courts apply federal law in numerous areas. It is true enough as a general matter that each sovereign is free to apply its own rules of procedure when applying the other sovereign's substantive law and that the federal government does not attempt to control procedure in state court (except where explicitly required by the Federal Constitution, such as by the Due Process Clause). But in di-

versity actions, where the *Erie* doctrine allows federal courts to apply federal procedure while construing state substantive law, federal courts nonetheless respect state retroactivity standards by treating them as part of state substantive law and therefore binding in federal court.[7] Given the federal courts' treatment of the retroactivity standards of the states, it is apparent that in this reverse-*Erie* situation, federal retroactivity standards should likewise be viewed as substantive and controlling when federal law is at issue in state court.

This inherent authority of the federal government to set retroactivity standards for new federal constitutionally based criminal rules in cases on collateral review is further shaped by several explicit sources of authority. This Court has authority to review a state court's decision construing the Federal Constitution in a state-court collateral review proceeding. *See* U.S. Const. art. III, sec. 2. The federal courts can review state-court criminal judgments via a writ of habeas corpus. *See* U.S. Const. art. I, sec. 9, cl. 2; 28 U.S.C. § 2254. Because federal courts have review over such cases, they have an undeniably strong interest in setting rules integral to the exercise of that review. The federal courts also have the power to interpret and enforce both federal constitutional rights in general and related matters such as their temporal scope and remedies for their violation. *See Chapman v. California*, 386 U.S. 18, 21 (1967). A final source of authority is necessity. There are no federal constitutional provisions or statutes regarding retroactivity of judicial decisions. The Court's retroactivity decisions could be rendered ineffectual if they could be ignored by states applying a different retroactivity standard under state law.

Finally, the third requirement for creating federal common law, that concurrent applicability of federal and state laws

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[7] *See, e.g., United States v. Estate of Donnelly*, 397 U.S. 286, 296 n.* (1970) (Harlan, J., concurring); *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 318-19 (5th Cir. 1999).

gives rise to irreconcilable conflicts, is satisfied here. The core conflict created by Danforth's position lies with the untenable dilemma in which it places federal courts, requiring them to choose between various aspects of their sovereignty, *i.e.*, their inherent power to set retroactivity standards versus their powers of judicial review and error-correction. This can be seen in the following scenario. Assume that a prisoner convicted in state court whose conviction is final seeks post-conviction relief in state court based on a new federal constitutional rule announced by this Court. Assume also that the state court, applying the new rule retroactively under state law (though it would not be retroactive under *Teague*), construes the rule against the prisoner. Assume further that the state court errs in its interpretation of the new federal rule. If the prisoner then seeks review in federal court, either via appeal to this Court or via a habeas petition in federal district court, the federal court would face two choices: it could either jettison the *Teague* retroactivity standard in order to review and correct the erroneous state-court ruling, or it could leave the erroneous state-court ruling unreviewed, allowing the state court to act as a *de facto* court of last resort for a federal constitutional claim. Either option is seriously flawed.

The first option-- using state retroactivity law to force federal courts to abandon federal retroactivity doctrine as a precondition for being able to review state-court decisions—amounts to an attempt to attach state-law conditions to the exercise of the federal judicial power, which this Court has repeatedly prohibited.[8]

The second option—requiring this Court to allow state courts to act as an unreviewed forum of last resort for the resolution of federal constitutional claims—is equally flawed.

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[8] *See Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 105-06 (1945) (state law cannot define federal remedies in diversity case); *Pennsylvania v. Williams*, 294 U.S. 176, 182 (1935) (federal jurisdiction not subject to control by state law); *Herron v. Southern Pac. Co.*, 283 U.S. 91, 94 (1931) (state law cannot control procedure in diversity case).

Federalism demands that there be one ultimate arbiter of federal constitutional law with power to correct erroneous interpretations by lower courts and to compel adherence to its precedents. The Constitution assigns that role to the Supreme Court. Similarly, the power of lower federal courts to review state-court criminal judgments in habeas cases underscores the importance of federal judicial review in general. This interest would likewise be compromised under this option.

Danforth's proposal also violates a basic principle of constitutional adjudication—that states cannot act to accomplish indirectly what they would be forbidden from accomplishing directly. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). No state could directly require federal courts to abandon federal retroactivity standards and follow state retroactivity standards when reviewing claims originating from state court. Neither can states attempt to do so indirectly, by forcing the federal courts into the untenable dilemma described above.

Teague thus meets the criteria for being a federal common-law rule and is binding in state court through the Supremacy Clause. Moreover, the Court has recognized that when it has prescribed a binding federal retroactivity standard, that standard is binding in a unitary sense, *i.e.*, it is the only retroactivity analysis applicable (in state or federal court) to federal constitutional rules. That is why the Court in *American Trucking* stressed the goal of "ensur[ing] the *uniform application* of decisions construing constitutional requirements[.]" *American Trucking*, 496 U.S. at 178 (emphasis added). That is why the Court in *Harper* stated that "[t]he Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Harper*, 509 U.S. at 100.

Two additional considerations point to why *Teague* must be viewed as binding in state court. The first is that the retroactivity standards established for judicial decisions construing the Federal Constitution should parallel and be

given equal dignity with the retroactivity standards applicable to federal statutes. If a federal statute expressly contains a retroactivity provision, the Supremacy Clause makes that provision binding in state court. Similarly, state courts have recognized that when federal statutes do not contain an express retroactivity provision, that they are to apply federal retroactivity and statutory construction principles in evaluating retroactivity.[9] The retroactivity standards set by this Court for judicial decisions are entitled to equal dignity with both Congressional pronouncements as to the retroactivity of particular statutes and with the general retroactivity standard that the Court has set for federal statutes in *Landgraf v. USI Film Products*.

The second consideration is the need for simplicity and consistency. Jurists and litigants should be able to rely on being able to apply a uniform federal retroactivity standard when construing federal law. As one state jurist has noted, the retroactivity of a Supreme Court decision should not "depend on the jurisdiction in which the defendant was prosecuted." *Windom v. State*, 886 So.2d 915, 944 (Fla. 2004) (Cantero, J., concurring).

III. APPLYING FEDERAL RETROACTIVITY STANDARDS TO FEDERAL CONSTITUTIONAL RULES IN STATE-COURT PROCEEDINGS IS CONSISTENT WITH PRINCIPLES OF FEDERALISM

Danforth claims that requiring state courts to apply a federal retroactivity standard to federal constitutional rules would turn "established concepts of federalism upside down" and deprive states of their abilities to act as laboratories to

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[9] *See, e.g., Newman Signs, Inc. v. Hjelle*, 317 N.W.2d 810, 815-16 (N.D. 1982); *Levine v. Fed. Deposit Ins. Corp.*, 651 So.2d 134, 136-37 (Fla. App. 1995). *See also Hagan v. Gemstate Mfg.*, 982 P.2d 1108, 1114 (Or. 1999) ("When this court construes a federal statute or regulation, we follow the methodology prescribed by federal courts.").

experiment with different approaches to collateral review. Pet.Br. at 6, 24-31. He is in error. Applying *Teague* in state court is fully consistent with principles of federalism.

Justice Black explained the balance accommodated by federalism in *Younger v. Harris*, 401 U.S. 37 (1971):

> [Federalism] does not mean blind deference to "States Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of *both* State and National Governments[.]

Id. at 44 (emphasis added). The common-sense proposition that, in a federal system, federal retroactivity standards control the retroactivity of a rule based on the Federal Constitution, while states are free to set their own retroactivity standards for rules based on state law, fully respects the interest of both the states and the federal government and gives states appropriate flexibility to administer justice and to experiment regarding collateral review proceedings.

If a state supreme court finds a new federal constitutional rule compelling, it can adopt the rule as a matter of state constitutional law, via court rule, or through exercise of supervisory powers; the state legislature may also adopt the rule by statute. State legislatures and courts likewise retain control over retroactivity of state statutes and state appellate decisions based on state law. Requiring state courts to apply *Teague* to federal constitutional rules in collateral review proceedings when it is properly invoked, while permitting a state executive branch to waive a *Teague* defense and allowing states total control over retroactivity standards for state-law based rules, is fully consistent with federalism.

IV. DANFORTH AND SUPPORTING *AMICI*'S REMAINING ARGUMENTS REGARDING CONSTRUING *TEAGUE* AS BINDING IN STATE-COURT COLLATERAL REVIEW ARE WITHOUT MERIT

Danforth and his supporting *amici* (and Kansas, which has filed an *amicus* brief supporting neither side) offer up several remaining arguments why *Teague* should not be viewed as binding in state court. They are in error.

First, Danforth isolates language in *Teague* referring to federal habeas corpus for state prisoners, relying on it to conclude that *Teague* meant only to establish a habeas rule. Pet.Br. at 7-8. As shown elsewhere in this brief, *Teague*'s primary distinction was between direct and collateral review, and its reference to federal habeas was only illustrative of the latter, not exclusive. Danforth also cites later decisions of this Court that have referred to *Teague* as applying in federal habeas actions. Pet.Br. at 10. These decisions do not purport to exclude state collateral review from the scope of *Teague*, and the fact that the Court has referred to federal habeas so often is unsurprising in that it is the primary vehicle by which such retroactivity issues come to it. The Court's most recent opinion applying *Teague*, *Whorton v. Bockting*, ___ U.S. ___, 127 S.Ct. 1173 (2007), consistently referred to *Teague* as applying to "collateral review," not habeas, and explained the difference between *Griffith* and *Teague* as a difference between direct and collateral review. 127 S.Ct. at 1180.

Second, Danforth points to the fact that this Court has not, in several cases, taken the state courts to task for failure to raise *Teague*, referring to *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993), *Schriro v. Farley*, 510 U.S. 222, 228-29 (1994), and *Horn v. Banks*, 536 U.S. 266, 271-72 (2002). Pet.Br. at 16-17. Danforth concludes that this shows a lack of federal interest in requiring state courts to follow *Teague*.

Danforth fails to account for the fact that this Court's treatment of these cases was capable of simpler explanations. First, *Teague* had not even been decided at the time of the state-court collateral proceedings in *Collins, Godinez,* and *Schriro.*[10] One would not expect this Court to take state courts to task for failing to apply a decision that did not yet exist. Second, courts are not obligated to *sua sponte* raise *Teague* when it is not raised by the government. Third, courts do not ordinarily address claims not raised by the parties. Fourth, a state can waive a *Teague* defense. These reasons provide sufficient explanation for why the Court did not take the state courts to task for failure to raise *Teague.*

Third, and related to the previous point, Danforth and *amici* find significance in the fact that states can waive *Teague.* Pet.Br. at 16-17; NACDL Br. at 13. They are of the view that a waiveable rule is not important enough to be binding on the states and that *Teague*'s waiveability undercuts the claim that construing *Teague* as binding is necessary to achieve equal treatment of similarly situated litigants. Their conclusions rest on flawed analysis.

The importance of a constitutional rule, and its status as binding in state-court proceedings under the Supremacy Clause, is not undercut by the fact that the rule is waiveable. Many important constitutional rights that are binding in state court are nonetheless waiveable by one of the parties, the Sixth Amendment right to jury trial being only one of many possible examples. And significantly, though most rights inure to the benefit of individuals, the Court has also rec-

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[10] *Teague* was decided February 22, 1989. *Teague*, 489 U.S. at 288. State court proceedings in *Collins* concluded prior to *Teague, see Collins*, 497 U.S. at 39-40, as they also did in *Schriro. See Schriro v. State*, 533 N.E.2d 1201 (Ind. 1989) (decided February 8, 1989). In *Godinez*, the state-court proceedings concluded three weeks after *Teague, see Moran v. Warden*, 810 P.2d 335 (Nev. 1989) (decided March 15, 1989), but given decision timelines it is apparent that there was no real opportunity to raise a *Teague* defense in state court in *Godinez.*

ognized that there are constitutional rights that belong to government entities that are binding in state court proceedings but that can be waived. *See Alden v. Maine*, 527 U.S. 706, 711-57 (1999) (recognizing that states enjoy fundamental sovereign immunity from suit in both state and federal court, but that it may be waived by a state).

Danforth's reliance on *Teague*'s waiveability to support the conclusion that it cannot be binding in state court proves too much. Danforth and *amici* in essence believe that this Court can do only one of two things, but not both—it can have a uniform rule, binding in state court, or it can have a waiveable rule, not binding in state court, but if the Court believes that a rule should be waiveable to accommodate other interests,[11] it can make the rule waiveable but such a rule can never be binding in state court. This is not true of rules deriving directly from the Constitution, such as the right to jury trial, and neither federalism nor the principles underlying federal common law dictate this result when the rule is a federal common-law rule. Significantly, *Teague*'s waiveability furthers two important interests in our federal system, uniform interpretation of federal law and federal court oversight of federal constitutional law.

Fourth, Danforth relies on a number of cases that he claims stand for the proposition that federal law is merely a floor, and that states are free to go beyond it so long as they provide at least the same level of retroactivity that federal law requires. Pet.Br. at 30-32, 34-35. Danforth cites *Johnson v. New Jersey*, 384 U.S. at 733; *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Beard v. Banks*, 542 U.S. 406, 412 (2004); *Johnson v. United States*, 544 U.S. 295, 306 & n.6 (2005); and *Washington v. Recuenco*, 126 S.Ct. 2546, 2551 n.1 (2006). Pet.Br. at 30-32, 34-35. The cases do not support his argument.

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[11] For example, a state could conclude that a prisoner's claim under the new rule was meritless and that it was beneficial and easier to obtain a decision construing the new rule than it was to litigate *Teague*.

Johnson v. New Jersey and *Lego v. Twomey* merely stand for the unremarkable proposition that states may provide additional protections *as a matter of state law*, not that they may do so under federal law.

As to *Beard*, Danforth places heavy reliance on a sentence stating that "[s]uch a judgment is 'final' despite the possibility that a state court might, in its discretion, decline to enforce an available procedural bar and choose to apply a new rule of law." Pet.Br. at 32, 35-36 (citing *Beard*, 542 U.S. at 412). This sentence did not purport to be a normative statement of the law, but rather was only a descriptive statement of what courts have occasionally done.

Johnson v. United States notes that states are free to enact statutes of limitations for state post-conviction relief actions, 544 U.S. at 306 & n.6, a fact which neither hinders nor advances Danforth's argument.

Finally, *Recuenco* did not hold that Washington was free to apply its own state-law harmless-error standard to Recuenco's case on remand. Given that Recuenco's case was on direct review, such a holding would have directly contravened *Chapman v. California*, 386 U.S. 18, 24 (1967), which requires states to apply federal harmless-error analysis on direct review when evaluating federal constitutional claims. Rather, Recuenco, who was subject to an enhanced sentence based on his use of a firearm, argued that Washington law did not authorize juries to make findings of fact as to firearms enhancements and that harmless-error analysis should not apply where no jury could make a finding. 126 S.Ct. at 2550. This Court disagreed, stating that the core issue was whether *Blakely* error was subject to structural or harmless-error analysis under federal law, that it was unclear that Recuenco's interpretation of Washington law was correct, but that because it held that *Blakely* error was subject to harmless-error analysis, the Washington Supreme Court could evaluate the federal harmless-error issue again in light of Recuenco's state-law argument. *Id.* at 2550-51 & n.1.

The fifth main objection to construing *Teague* as binding in state court is set out in Kansas's *amicus* brief. Kansas argues that states are not constitutionally obliged to provide collateral review procedures, that states have significant leeway to structure collateral review systems when they do create them, and that the federal government's interest in retroactivity standards for federal constitutional rights in state court ends when a conviction has become final on direct review. Kan.Br. at 3-18. Kansas is in error.

First, this is the same position advanced by South Carolina and rejected in *Yates v. Aiken*, 484 U.S. at 217-18. To be sure, the Court did not directly confront the claim's merits in *Yates*, but the claim did not receive a warm reception in *Yates* and should be rejected here as well.

Second, Kansas cites *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), and two cases relying on *Finley*, *Murray v. Giarratano*, 492 U.S. 1, 10 (1989), and *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 402-03 (2001), for the proposition that states are not constitutionally obliged to provide post-conviction relief mechanisms. Kan.Br. at 6. The language in *Finley* that Kansas relies on is arguably *dicta* – the issue in *Finley* was not whether states have to provide a post-conviction relief process, but rather whether there is a right to counsel in such actions, and the prior decision *Finley* cited for this proposition, *United States v. MacCollom*, 426 U.S. 317, 323 (1976), was only a plurality opinion. But even if *Finley* is not *dicta*, that does not support Kansas's position.

Kansas's argument rests on the premise that if a state-created right or procedure is not required by the Constitution, then it is outside the reach of the Constitution and the federal courts. But as Kansas recognizes, states are not required to provide an appellate process, and yet this Court has recognized that the Constitution permits it to review aspects of state appellate process for compliance with basic constitutional requirements. *See Smith v. Robbins*, 528 U.S. 259, 270-84 (2000); *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985).

Similarly, the fact that states may not be required to provide collateral review mechanisms does not place them completely beyond the purview of the Constitution or federal courts. The Court has applied the Equal Protection Clause of the Fourteenth Amendment to invalidate a state collateral review law. *See, e.g., Long v. Dist. Ct. of Iowa*, 385 U.S. 192, 194-95 (1966). And though the Fourteenth Amendment's Due Process Clause gives states wide latitude to structure their collateral review mechanisms, such proceedings are not beyond the reach of the Due Process Clause either.[12]

As noted above, the Constitution itself does not compel the adoption of a particular retroactivity standard for federal constitutional rules. However, because the Court has adopted the *Teague* standard, principles of federal common law support its application to state-court collateral review. But in any event, recognizing that retroactivity for federal constitutional rules is a rare area where a federal standard is required does not conflict with the cases holding that states have wide latitude to structure their collateral review processes. Kansas's position should be rejected.

V. AFFIRMING *DANFORTH* WORKS NO DISRUPTION TO EXISTING PRECEDENT; DANFORTH'S POSITION IF ADOPTED WOULD UNDERCUT SEVERAL SIGNIFICANT PRECEDENTS

Amicus American Civil Liberties Union characterizes the Minnesota Supreme Court's decision as "startling" and reaching an "astonishing" conclusion, ACLU Brief at 2, in essence implying that an additional reason counseling against

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[12] This latitude to structure state collateral-review mechanisms may conceivably extend to types of cognizable claims, burden of proof, harmless-error standards for review, methods of legal assistance for claimants, statutes of limitation, and claim-joinder and claim-processing rules. None of these pose as direct a conflict as allowing states to apply their own retroactivity standards to federal constitutional rules.

affirmance is that doing so would result in a significant disruption to state-court jurisprudence. *Amici* is in error in that the Minnesota Supreme Court's decision is in accord with substantial authority from other states, and affirming will cause no upheaval in state law. By contrast, the rationales underlying the arguments of Danforth and *amici* would fatally undermine several of this Court's precedents.

To begin, a number of state appellate courts have explicitly taken the position that *Teague* is binding when evaluating the retroactivity of federal constitutional rules in state-court collateral review proceedings.[13] It is apparent from the manner in which additional states apply *Teague* that they too view *Teague* as binding.[14] Additional states have noted the issue without deciding but lean towards the view that *Teague* is binding, or have otherwise manifested this view in discussing retroactivity law.[15] And though a small number of

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[13] *See Porter v. State*, 102 P.3d 1099, 1102 (Idaho 2004); *State v. Egelhoff*, 900 P.2d 260, 267 (Mont. 1995); *State v. Purnell*, 735 A.2d 513, 517, 520-24 (N.J. 1999); *Page v. Palmateer*, 84 P.3d 133, 136-38 (Or. 2004); *Talley v. State*, 640 S.E.2d 878, 880-81 (S.C. 2007); *Taylor v. State*, 10 S.W.3d 673, 679 (Tex. Crim. App. 2000). *See also Houlihan v. State*, 706 N.W.2d 731, 734 (Mich. 2005) (Markman, J., dissenting on other grounds, joined by Corrigan and Young, JJ.)

[14] *See People v. Cage*, 155 P.3d 205, 210 & n.4 (Cal. 2007) (recognizing *Griffith-Teague* direct-collateral distinction); *In re Moore*, 34 Cal.Rptr.3d 605, 609-12 (Ct. App. 2005) (applying *Teague*); *State v. Reeves*, 453 N.W.2d 359, 382-84 (Neb. 1990); *People v. Eastman*, 648 N.E.2d 459, 463-65 (N.Y. 1995); *Thomas v. State*, 888 P.2d 522, 527 (Okla. Crim. App. 1994); *People v. Hughes*, 865 A.2d 761, 780-81 (Pa. 2004); *State v. Gomez*, 163 S.W.3d 632, 644 n.9, 651 n.16 (Tenn. 2005); *Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001); *Mueller v. Murray*, 478 S.E.2d 542, 546-49 (Va. 1996).

[15] *See Edwards v. People*, 129 P.3d 977, 981-82 (Colo. 2006); *Duperry v. Solnit*, 803 A.2d 287, 317-19 (Conn. 2002); *State v. Gomes*, 113 P.3d 184, 188-90 (Haw. 2005); *Drach v. Bruce*, 136 P.3d 390, 400-04 (Kan. 2006); *Bowling v. Commonwealth*, 163 S.W.3d 361, 370-71 (Ky. 2005); *State v. Adams*, 912 A.2d 16, 34-38 (Md. Spec. App. 2006); *State v.*

states are of the view that *Teague* is not binding,[16] the majority of states (including most of those that view *Teague* as not binding) have nonetheless voluntarily adopted or follow *Teague*.[17] The net result is that affirming *Danforth* will work no significant disruption to the fabric of the law.

By contrast, accepting Danforth and *amici*'s arguments would undermine a number of this Court's precedents. *Griffith* and *Harper* would fail to the degree that they direct *state* courts to apply new federal constitutional rules to all cases pending on direct review in criminal and civil cases. Kansas asserts that the Court has "divined" a constitutional basis for these rules. Kan.Br. at 10. That is true insofar as those cases apply to this Court's direct review of state cases (the basis stems from preserving the integrity of this Court's Article III review powers). But there is no specific constitu-

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Tallard, 816 A.2d 977, 979-80 (N.H. 2003); *Agee v. Russell*, 751 N.E.2d 1043, 1046-47 (Ohio 2001); *Azeez v. Mangum*, 465 S.E.2d 163, 170-72 (W.Va. 1995). Colorado and New Hampshire adopted *Teague*.

[16] *See Smart v. State*, 146 P.3d 15, 17-27 (Alaska App. 2006) (Alaska Supreme Court review granted February 13, 2007); *Johnson v. State*, 904 So.2d 400, 407-09 (Fla. 2005); *State v. Mohler*, 694 N.E.2d 1129, 1132 (Ind. 1998); *State v. Whitley*, 606 So.2d 1292, 1296-97 (La. 1992); *State v. Whitfield*, 107 S.W.3d 253, 265-68 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 469-72 (Nev. 2002); *State v. Forbes*, 119 P.3d 144, 146-47 (N.M. 2005); *State v. Zuniga*, 444 S.E.2d 443, 445-46 (N.C. 1994); *Cowell v. Leapley*, 458 N.W.2d 514, 517-18 (S.D. 1990); *State v. Evans*, 114 P.3d 627, 633 (Wash. 2005). Indiana, Louisiana, Nevada, North Carolina, and Washington voluntarily adopted *Teague*.

[17] *See State v. Slemmer*, 823 P.2d 41, 48-49 (Ariz. 1991); *Flamer v. State*, 585 A.2d 736, 748-49 (Del. 1990); *Harris v. State*, 543 S.E.2d 716, 717-18 (Ga. 2001); *People v. Flowers*, 561 N.E.2d 674, 681-82 (Ill. 1990); *Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1989); *Carmichael v. State*, ___ A.2d ___, 2007 WL 2003414, at *6 (Maine, July 12, 2007); *Commonwealth v. Bray*, 553 N.E.2d 538, 540-42 (Mass. 1990); *Manning v. State*, 929 So.2d 885, 896-900 (Miss. 2006); *Pailin v. Vose*, 603 A.2d 738, 741-42 (R.I. 1992); *State v. Lagundoye*, 674 N.W.2d 526, 531-32 & n.11 (Wis. 2004).

tional provision that authorizes such a directive to *state* courts, as to which *Griffith* and *Harper* can only be understood as federal common-law rules based on the Court's inherent sovereign authority to set retroactivity standards. Judges and commentators have likewise suggested that this Court's authority to require state courts to apply the *Chapman* harmless-error standard on direct review might be viewed as based on federal common law. *See Brecht v. Abrahamson*, 507 U.S. 619, 645 (1993) (White, J., dissenting, joined by Blackmun and Souter, JJ.); D. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1, 5 (1994). The damage to the accepted framework of criminal procedure that would result from adopting Danforth's position provides an additional reason to affirm.

CONCLUSION

This Court should affirm the Minnesota Supreme Court's holding that the *Teague* standard governs the retroactivity analysis for federal constitutional rules at issue in state-court collateral review proceedings.

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IN THE

Supreme Court of the United States

STEPHEN DANFORTH,

Petitioner,

—v.—

MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MINNESOTA IN SUPPORT OF PETITIONER

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Jones v. Rath Packing Co.,
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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Minnesota is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving a serious question regarding the ability of state courts to enforce federal constitutional rights. Given its longstanding interest in the vindication of federal rights, the question before the Court is of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

The petitioner, Stephen Danforth, sought post-conviction relief in state court on the ground that his conviction had been obtained in violation of the Confrontation Clause as authoritatively interpreted by this Court in *Crawford v. Washington*, 541 U.S. 36 (2004). The Minnesota Supreme Court held that it could not consider the *Crawford* decision in its analysis because *Crawford* announced a "new rule" of federal procedural law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). This Court granted certiorari to decide whether the Minnesota court erroneously understood that it was obligated to apply the *Teague* choice-of-law methodology in state post-conviction proceedings.

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

SUMMARY OF ARGUMENT

Mr. Danforth's brief explains why the Minnesota Supreme Court fundamentally misunderstood both this Court's decision in *Teague* and the *Teague* doctrine as this Court has elaborated it in subsequent cases. The focus in *Teague* is exclusively on the appropriate choice-of-law methodology for federal habeas corpus courts to employ in order to avoid undue interference with previous proceedings in state court. The *Teague* doctrine is a means of orchestrating federal-state relations in the interests of comity and the finality of convictions. Those underlying rationales do not warrant imposing the *Teague* methodology on unwilling state courts.

This *amicus* brief does not repeat Mr. Danforth's arguments regarding the meaning of *Teague*, but places the question before the Court in a larger framework in order to clarify just how startling the decision below was. The Minnesota Supreme Court held that it was bound (not permitted, but bound) to set aside its own arrangements for addressing federal claims in state post-conviction proceedings and to adopt, instead, the federal doctrinal framework this Court has established for handling federal claims advanced in federal habeas corpus. Starting from that erroneous premise, the state court reached the astonishing conclusion that it was barred by federal law (of some stripe) from entertaining a claim of federal right, grounded in extant federal constitutional law.

No feature of federal law prohibits a state court from vindicating federal constitutional rights. The very idea is alien to federalism. State courts usually are *obligated* to enforce federal rights and, certainly, are never *forbidden* to do so. This Court has held, of course, that there are occasions when state courts may decline to consider federal claims in order to protect legitimate state interests. But the Court has never held that a state court is unable to make its own assessments of local interests.

In order to sustain the decision below, this Court must hold that some species of federal law overrides a state court's ability to recognize and enforce claims based on federal constitutional law. The Constitution *does* impose a choice-of-law methodology on all courts (federal and state) in cases in which the conviction is not yet final. But nothing in the Constitution requires a state court to apply federal law (in the form of *Teague*) as a choice-of-law methodology in state post-conviction proceedings.

Nor does any federal statute or body of decisional law preempt state arrangements in this context. This Court has long maintained a presumption against preemption and, on that basis, has demanded a clear indication that a federal statute or federal common law doctrine is meant to displace state law. No statute or decision of this Court (least of all *Teague*) indicates any such purpose. By contrast, Congress has encouraged state courts to implement existing holdings of this Court—by limiting the authority of federal courts to award habeas relief in the wake of a state decision on the merits that respects this Court's holdings at the time of the state court decision. 28 U.S.C. § 2254(d).

Nor, finally, does the "reverse-*Erie*" doctrine support the conclusion that federal law (specifically, *Teague*) applies in state post-conviction proceedings. Federal law governs in state court proceedings only when powerful federal interests prevail over competing local concerns. In this instance, federal interests in the vindication of federal constitutional claims are served *not* by forcing unwilling state courts to use *Teague* as their choice-of-law doctrine in state post-conviction proceedings, but rather by allowing state courts the ability to consider federal claims that federal habeas courts cannot entertain.

ARGUMENT

I. THE *TEAGUE* DOCTRINE IS A POLICY-DRIVEN CHOICE-OF-LAW METHODOLOGY TAILORED SPECIFICALLY FOR CASES ON COLLATERAL REVIEW IN FEDERAL COURT

The Minnesota Supreme Court misapprehended this Court's *Teague* jurisprudence. The point of *Teague* was to fashion a choice-of-law methodology for cases on federal collateral review, specifically federal habeas corpus. The *Teague* Court rehearsed the history of the problem stretching back to *Linkletter v. Walker*, 381 U.S. 618 (1965), described Justice Harlan's alternative approach, and adopted that approach (with significant modifications) for federal habeas corpus. *Teague*, 489 U.S. at 307-08. The Court explained that *Teague's* alternative analysis for federal habeas proceedings was devised in the interests of the "comity" owed to states and state courts and the "finality" of judgments. Thus, *Teague* was (and is) consistent with other doctrines governing the availability of federal habeas corpus—for example, the doctrine the Court has developed for federal courts to follow when state courts decline to consider federal claims on the ground that they were not properly raised in state court. *Id.* at 308.

Specifically, the Court held in *Teague* that the "costs imposed on the State[s] by the retrospective application of new rules of constitutional law *on habeas corpus* . . . generally outweigh the benefits." *Teague*, 489 U.S. at 310 (emphasis added) (quoting *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in the judgment)). The "application of new rules to cases on collateral review . . . *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* (emphasis in original). Against those state interests, the Court weighed the "purpose for which the writ of habeas corpus is made available"—namely, to provide "a necessary additional incentive to trial and appellate courts throughout

the land to conduct their proceedings in a manner consistent with established constitutional standards." *Id.* at 306 (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). To "perform this deterrence function," the Court explained, a "habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Id.* (quoting *Desist*, at 262-63 (Harlan, J., dissenting)). In a subsequent decision, the Court said that *Teague* is meant effectively to "validate reasonable, good-faith interpretations of existing precedents by the state courts." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

Thus, the *Teague* decision and the general doctrine that has grown up around that decision have only to do with the appropriate analysis in federal habeas corpus—an analysis meant to ensure that federal courts do not interfere unduly with previous state court judgments. The comity and finality rationales behind *Teague* in federal habeas do not travel to *state* post-conviction proceedings—proceedings that produce the very state judgments that *Teague's* limit on federal habeas courts is meant to preserve from undue disruption.

II. THE CONSTITUTION DOES NOT BAR STATE COURTS FROM ENFORCING EXTANT FEDERAL RIGHTS IN STATE POST-CONVICTION PROCEEDINGS

The Minnesota Supreme Court confused this Court's decisions regarding the constitutionally grounded choice-of-law methodology for direct-review cases, on the one hand, with the Court's decisions regarding the policy-based choice-of-law methodology for cases on federal collateral review, on the other.[2]

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[2] The Court has made it clear that the temporal reach of a federal constitutional right is not a property of the right itself. Even in the heyday of *Linkletter v. Walker*, the Court treated the effective range of a

This Court held in *Griffith v. Kentucky*, 479 U.S. 314 (1987), that the Constitution mandates a choice-of-law framework for cases on direct review. Borrowing from Justice Harlan, the Court explained that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of *constitutional* adjudication." *Id.* at 322 (emphasis added) (relying on *Mackey*, 401 U.S. at 680 (Harlan, J., concurring in the judgment in part and dissenting in part)).

All courts (federal and state) are constitutionally obligated to employ the *Griffith* choice-of-law methodology at trial and on direct appeal. That methodology makes all federal claims cognizable. The familiarity or novelty of a legal argument is beside the point when a claim is examined prior to the date on which a criminal defendant's conviction becomes final. This Court decides direct-review cases on the basis of federal law as it stands at the time of decision and overturns any state court decision found to be erroneous.

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federal right not as an intrinsic element of the right proper, but, at most, as a function of its "purpose." *Linkletter*, 381 U.S. at 629. And, of course, the Court abandoned even that connection between a right and its field of operation when in *Teague* the Court embraced Justice Harlan's position on the matter:

> Inquiry into the nature, purposes, and scope of a particular constitutional rule is essential to the task of deciding whether that rule should be made the law of the land. That inquiry is, however, quite simply irrelevant in deciding, once a rule has been adopted as part of our legal fabric, which cases then pending in this Court should be governed by it.

Mackey v. United States, 401 U.S. 667, 681 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part). There is no basis, then, for the idea that constitutional rights come with their own, embedded rules governing the temporal contexts in which they operate. In this case, for example, there is no plausible argument that the Confrontation Clause (or *Crawford's* interpretation of it) is inapplicable in state post-conviction proceedings by virtue of anything intrinsic to that clause.

There is no constitutionally grounded choice-of-law methodology for application after a conviction has become final. The question whether novel claims should be entertained in collateral proceedings is a matter of policy for the court concerned, not constitutional law. This Court has had occasion to make the necessary policy determination for purposes of *federal* habeas corpus proceedings and has chosen to adopt Justice Harlan's general position. As Justice Harlan explained, the choice-of-law doctrine appropriate for federal habeas turns on the "purpose for which the writ of habeas corpus is made available" in federal court. *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in the judgment in part and dissenting in part).

In *Teague*, this Court adopted a choice-of-law methodology tailored to the purposes of federal habeas corpus. In doing so, the Court was clear, as Justice Harlan was clear, that the *Teague* doctrine is a matter of federal remedial policy formulated for use by federal habeas corpus courts. Thus, *Teague*, the very decision that articulated the doctrine the Minnesota Supreme Court thought it must follow, itself refutes any contention that state courts are under a constitutional obligation to conform to a choice-of-law doctrine shaped and adopted for federal habeas corpus. Rather, a state court is entitled to undertake its own assessment of its own interests and may, if it chooses, reach federal claims that *Teague* would foreclose in the federal forum.

Of course, a state court may run afoul of the Constitution if it employs arrangements for handling claims in post-conviction proceedings that fail to operate even-handedly or fairly. State choice-of-law practices that discriminate irrationally among litigants obviously can violate the Fourteenth Amendment. Yet a state scarcely must adopt the *Teague* doctrine to satisfy due process and equal protection standards in this context. For example, a state might validly employ the *Griffith* methodology or might adopt (and consistently apply) a definition of "new rules" that

is less expansive than the definition *Teague* specifies for federal habeas corpus.[3]

The cases upon which the Minnesota Supreme Court relied do not support the conclusi n that *Teague* is mandatory in state post-conviction proceedings. In *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990), this Court held that a state court is obligated to employ federal methodology to determine whether a constitutional decision by this Court is applicable to a civil case *while that case is in the direct review channel.*[4] There was nothing remarkable about that; *American Trucking* was merely the civil analog of *Griffith*. *American Trucking*, 496 U.S. at 214 (Stevens, J., dissenting); accord *Id.* at 201 (Scalia, J., concurring in the judgment).[5]

The Court did *not* say in *American Trucking* that a state court entertaining a claim in state *collateral* proceedings is constitutionally required to employ the choice-of-law methodology this Court has adopted, as a matter of policy,

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[3] The only constitutional issue the Court mentioned in *Teague* was the risk that prospective adjudication might produce advisory opinions—prohibited in federal courts, but not in state courts. The Court explained that one reason for distinguishing cleanly between direct- and collateral-review cases in federal court is to avoid unfairness among similarly situated litigants. The Court did not suggest, however, that the *Teague* doctrine in all its details is constitutionally required in the federal forum. Federal habeas petitioners are treated even-handedly not because they are subject to the particular definition of "new" rules the Court has adopted, but because they are all subject to the same definition, whatever it is.

[4] In *Ashland Oil v. Caryl*, 497 U.S. 916 (1990) (*per curiam*), also cited by the Minnesota Supreme Court below, this Court underscored that *American Trucking* was a "direct review" case—as was *Ashland Oil*. Id. at 918.

[5] In *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), the Court formally adopted *Griffith* for direct-review civil cases. Today, accordingly, in both civil and criminal cases, state courts have a constitutional duty to employ the choice-of-law doctrine this Court has mandated for cases in which there has been no final judgment. *See also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995); *James B. Beam Distill. Co. v. Georgia*, 501 U.S. 529 (1991).

for federal collateral review in habeas corpus. The whole point of *Teague* and *Griffith* is to distinguish collateral review from direct review. A state court may sensibly conclude that the policies underlying the *Teague* doctrine in federal habeas do not warrant a similar choice-of-law methodology in state post-conviction proceedings and thus may adopt a different analysis that leads state courts to entertain federal claims that would be foreclosed in federal habeas by virtue of *Teague*.[6]

In *Michigan v. Payne*, 412 U.S. 47 (1973), the Michigan Supreme Court had determined a federal claim in the defendant's favor on direct review, relying on *North Carolina v. Pearce*, 395 U.S. 711 (1969) (then recently decided). This Court reversed, explaining that *Pearce* was not "retroactive." At the time, however, the Court obviously had not yet recognized the crucial distinction (subsequently drawn in *Griffith* and *Teague*) between direct- and collateral-review cases. Examined according to today's framework, the decision in *Payne* was consistent with *Griffith* and thus correct insofar as it contemplated that the state court was obligated to employ a federal choice-of-law methodology to determine whether *Pearce* was applicable to the prisoner's claim. The case was still in the appellate pipeline and thus subject to the constitutionally mandated analysis for direct review cases. Yet the decision in *Payne* was inconsistent with *Griffith* and thus wrong by today's standards insofar as it overturned a state decision because it rested on a recent

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[6] In cases leading to the decision below, the Minnesota Supreme Court began well enough, but later faltered. In *O'Meara v. Minnesota*, 679 N.W.2d 334 (2004), the court held (correctly) that it was obligated to follow the federal choice-of-law doctrine in *Griffith* in a direct-review case. Unfortunately, the opinion in *O'Meara* dropped dicta suggesting that the *Teague* doctrine would control in state post-conviction proceedings. Then, in *Minnesota v. Houston*, 702 N.W.2d 268 (2005), the court held (incorrectly) that it was obligated to employ *Teague* choice-of-law methodology in a case on collateral review. The Minnesota court's mistake was to read language in this Court's direct-review cases out of context. Yet here, as elsewhere, context matters.

precedent that this Court (employing the *Linkletter* approach) regarded as unavailable.

This is not to suggest that a state court can deny that *Crawford* created a "new rule" within the meaning of *Teague*. Nor is it to propose that a state can conclude that the rule in *Crawford* is a "watershed" procedural rule for *Teague* purposes. Those are questions of federal law, and where they are implicated (in federal habeas proceedings) this Court's holdings are authoritative. This is rather to say that with respect to *state* collateral proceedings, a state court is not obligated to employ the *Teague* doctrine as its choice-of-law methodology. And if a state court does not adopt *Teague* (if, for example, it employs something akin to *Griffith*) the federal questions that *Teague* entails do not arise.

In this case, the Minnesota Supreme Court was free to adopt a choice-of-law methodology that permitted a claim based on *Crawford* to be considered. When the Minnesota Supreme Court addressed Mr. Danforth's claim, it was clear beyond cavil that *Crawford* stated an accurate rule of federal constitutional law. The state court may not have been constitutionally required to apply that rule of law, but it certainly was not constitutionally barred from doing so.

III. NON-CONSTITUTIONAL FEDERAL LAW DOES NOT PREEMPT STATE ARRANGEMENTS THAT PERMIT CONSIDERATION OF FEDERAL CLAIMS IN STATE POST-CONVICTION PROCEEDINGS

The Minnesota Supreme Court may also have misunderstood this Court's preemption precedents anchored on the Supremacy Clause. No federal statute or body of decisional law preempts a state's own choice-of-law doctrine in this context. The starting place for preemption analysis is the conventional default position prescribed by American federalism—namely, that "federal law takes the state courts as it finds them." Henry Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954).

Any preemption argument faces signficiant hurdles at the threshold. Federal law presumptively does *not* preempt state arrangements. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). If Congress means to dislodge state law, it must state that purpose "explicitly." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). In the absence of "an express congressional command," federal law will be found to preempt state law only if federal and state requirements are in actual conflict or if federal law "so thoroughly occupies a legislative field" as to "make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone*, 505 U.S. at 518 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Moreover, whenever possible, this Court does not construe federal statutes to have preemptive effect that, in turn, would raise constitutional issues. E.g., *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002) (declining to read 28 U.S.C. § 1367(d) to preempt a state statute of limitations for purposes of claims that are dismissed in federal court on the basis of state sovereign immunity). This Court has noted the argument that state procedural arrangements for litigation in state court may enjoy a measure of constitutional protection. In *Jinks v. Richland County*, 538 U.S. 456 (2003), the Court explained: "W]e need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts." *Id.* at 465.[7] No federal statute remotely prescribes federal arrangements for the states to follow in their own post-conviction proceedings. To the contrary, the statutes in place

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[7] In *Jinks*, the Court read the tolling provision involved in *Raygor* to suspend a state limitations period where no constitutional sovereign immunity was implicated. Under the Court's construction of the federal statute, the preemption of state law was essential to the ability of federal courts to adjudicate claims within their jurisdiction. In those circumstances, the Court had no constitutional doubts about the federal statute's validity (read that way) and thus gave the federal statute preemptive effect.

focus exclusively on the *federal* courts. Time and again, *federal* habeas statutes are expressly addressed to *federal* courts, justices or judges, and, concomitantly, to applications for the *federal* writ of habeas corpus. E.g., 28 U.S.C. § 2254. The unavoidable conclusion is that Congress has taken responsibility for establishing (and limiting) the purview of federal courts, but has not thought it advisable or appropriate to superintend the states and their courts. Indeed, the restrictions Congress has placed on federal habeas corpus are plainly meant to prevent federal courts from interfering with state courts.

Far from requiring state courts to employ *Teague*, Congress has enacted legislation that assumes that state courts may choose to entertain federal claims based on rules of federal law as they currently stand—not, as *Teague* would have it, at the time a prisoner's conviction became final on direct review. Under § 2254(d), a federal court's authority to grant habeas relief turns on a state court's adherence to this Court's holdings "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (opinion for the Court by O'Connor, J.). Indeed, § 2254(d) plainly *encourages* state courts to implement extant decisions of this Court, whether or not those decisions were in place at the time a prisoner's conviction became final. If a state court does not, the resulting judgment will not be entitled to the deference that § 2254(d) ordinarily directs federal habeas courts to accord to state court judgments on the merits.

This Court has not fully considered the implications of the different dates that *Teague* and § 2254(d) make crucial in federal court -- the date on which a conviction became final (*Teague*), and the date on which a state court reached a decision on the merits of a federal claim (§ 2254(d)) -- and there is no need to do so here. Yet one possible and problematic consequence of imposing *Teague* on state post-conviction proceedings would be to place state courts in an inescapable bind. In a case in which a prisoner's claim rests on a recent holding by this Court that announced a "new rule" within the meaning of *Teague*, a state court would be

unable to entertain the claim in post-conviction proceedings. But the state court's failure to follow such a holding would be contrary to clearly established federal law at the time of the state court's decision. Accordingly, the state court's decision would not be entitled to deference under § 2254(d) in subsequent federal habeas corpus proceedings.

No decision by this Court purports to impose federal choice-of-law methodology on state post-conviction practice. When the Court establishes federal decisional law with preemptive effect, the Court makes it perfectly clear what it is doing and why. *E.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (acknowledging and explaining the recognition of a federal common law "contractor defense" that displaced state liability rules). As Mr. Danforth's brief explains, *Teague* is concerned only with the proper role of federal courts—again to avoid interference with state courts. Nothing in *Teague* or any subsequent decision in the *Teague* line reflects any intention to reach into state court proceedings and to give states' attorneys a federal common law argument for defeating a federal constitutional claim.

IV. THE "REVERSE *ERIE*" DOCTRINE DOES NOT REQUIRE STATES TO FOLLOW *TEAGUE* IN STATE POST-CONVICTION PROCEEDINGS

The Minnesota Supreme Court could not plausibly have concluded that the federal *Teague* doctrine is applicable in state court by virtue of the "reverse-*Erie*" doctrine.[8] There

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[8] The *Teague* doctrine provides a federal choice-of-law methodology for federal courts to apply in deciding whether to entertain a federal claim in federal habeas—directing them to apply "old" rules of procedural law, but not "new" rules (other than "watershed" rules). The reverse-*Erie* doctrine supplies a choice-of-law methodology for state courts to employ in deciding whether state or federal law applies to legal questions arising in state proceedings. We agree that reverse-*Erie* is a federal choice-of-law analysis that state courts are obligated to employ—subject to review in this Court. We do not agree that, in this instance, reverse-*Erie* leads to

are, to be sure, circumstances in which federal law supersedes state law in cases adjudicated in state court—but always to protect important federal interests. The Federal Employers' Liability Act cases, *Brown v. Western Ry.*, 338 U.S. 294 (1949), and *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952), are illustrations. Federal arrangements for pleading and trial by jury were applicable in those instances because competing, inconsistent state practices compromised federal rights. Likewise, in *Felder v. Casey*, 487 U.S. 131 (1988), federal law overrode a state notice requirement, but only to prevent the frustration of federal claims.[9]

When federal interests are *not* at risk, as they are not here, federal law does *not* displace state law. The best illustration is *Johnson v. Fankell*, 520 U.S. 911 (1997), where the Court concluded that the federal rule permitting interlocutory review of decisions denying qualified immunity at the trial level was limited to federal court and need not be followed by the states in state court proceedings. By denying the right to an interlocutory appeal, the state practice upheld in *Johnson* fostered federal interests in vindicating *plaintiffs'* federal rights. And while competing state interests might have justified postponing trials to allow for interlocutory appeal, there was no basis for introducing federal law to

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the conclusion that federal (*Teague*) choice-of-law methodology is applicable in state court.

[9] The Court's admiralty precedents are to the same effect. In some admiralty contexts, the federal interest in uniformity justifies the substitution of federal law for the local rules that state courts would ordinarily follow. *E.g.*, *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986). But when federal interests are insufficiently strong, state courts are entitled to apply state-law arrangements. *E.g.*, *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). Of course, the Court has often been divided over whether federal interests warrant the extraordinary step of displacing state law. That internal disagreement underscores that the analysis necessarily involves an assessment of relevant federal interests, the absence of which would easily lead to the conclusion that state law governs in state court in the ordinary course.

protect state interests the state itself regarded as of secondary importance.[10]

In this case, the federal interests are all on the side of vindicating the prisoner's federal, Sixth Amendment rights. There are competing state interests on the other side, chief among them the interests associated with finality. But if the Minnesota Supreme Court puts federal interests first, there is no basis in any reverse-*Erie* precedent for imposing the federal *Teague* methodology upon the state court.

The *Teague* doctrine was not established to displace state arrangements for entertaining federal claims, but to prevent federal habeas courts from interfering with state arrangements. This is especially apparent in the Court's definition of "new" rules (which cannot be entertained in a federal habeas court). The Court has explained that "new" rules are not limited to "clear breaks" from precedent. "[G]radual developments in the law over which reasonable jurists may disagree" can also produce "new" rules. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). Unless previous precedents "dictated" or "compelled" the conclusion that a prisoner's claim was valid when his or her conviction because final, a district court would have to create a "new" rule in order to find the prisoner's claim meritorious today. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). A federal habeas court will not entertain a claim in a habeas posture "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively

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[10] The Court explained in *Fankell* that the defendants' qualified immunity "ha[d] its source in a federal statute" (42 U.S.C. § 1983). Yet the "ultimate purpose" of that immunity was the protection of state officials from the "overenforcement of federal rights." Accordingly, the state court's failure to allow an interlocutory appeal was "less an interference with *federal* interests than a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense" (against the plaintiff's federal constitutional claim). Id. at 919 (emphasis in original).

unreasonably by not extending the relief sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

The expansive *Teague* definition of what counts as "new" in federal habeas proceedings not only insulates state convictions from attack to protect state interests in finality, but also shields state judgments on federal questions. This *Teague* account of "new" rules necessarily subordinates federal interests in the vindication of federal rights. Obviously, a federal claim can be meritorious even if, at the time the prisoner's conviction became final, a state court might reasonably have rejected it. Yet the Court has made the policy judgment that federal interests should yield *in federal habeas proceedings* for these two, related reasons: to protect countervailing states interests in the finality of state judgments and to prevent inferior federal courts from entertaining federal claims and reaching results at odds with previous "reasonable" state decisions.

There is no justification for *forcing* state courts to employ *Teague's* definition of cognizable claims, when the Court itself has tailored that definition exclusively for federal courts in an effort to accommodate state interests and prevent federal courts from second-guessing state judgments. The states themselves are in a far better position to identify and weigh the local interests implicated in state convictions challenged on federal grounds. See *Johnson v. United States*, 544 U.S. 295, 316-17 (2005) (Kennedy, J., dissenting) (joined by Stevens, Scalia, and Ginsburg, J.J.) (acknowledging that states are "free to impose time limitations" on the availability of post-conviction relief if they conclude that such limits are "necessary to protect the integrity of their own judgments" but explaining that states may elect not to do so).

Moreover, the *Teague* doctrine in federal court absorbs enormous federal resources. The federal judicial system devotes countless hours poring over the precedents to make the judgments *Teague* requires. Often enough, those judgments are reached by divided vote. Yet, again, the Court

has concluded that the complex, demanding *Teague* doctrine in federal court is justified to safeguard state interests and to preserve "reasonable" state court judgments on the merits of federal claims.

It would be grossly inefficient for the Court to insist that state courts, too, must wrestle with the burdensome litigation required to resolve close questions regarding the *Teague* definition of "new" rules.[11] A state court might well select a more prisoner-friendly choice-of-law methodology for state post-conviction proceedings, either to put itself in a position to vindicate federal constitutional rights or to spare itself the time-consuming task of sorting "new" rules from "old" within the meaning of *Teague*. If so, there is no federal interest to be served by trumping that choice and thus no warrant for substituting federal law for state law in this context.

The Court has held that a state may decline to invoke *Teague* in federal habeas corpus and choose, instead, to join issue with a habeas petitioner on the merits of a claim that *Teague* would foreclose. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). That feature of the *Teague* doctrine itself reflects the understanding that states may prefer (and are entitled to prefer) to address federal claims forthrightly rather than fend them off on the basis of countervailing state interests in the finality of judgments.[12]

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[11] Proceeding from the erroneous premise that it is obligated to employ *Teague*, the Minnesota Supreme Court has thought itself bound to grapple both with *Teague's* definition of "new" rules, e.g., *Houston*, 702 N.W.2d at 271-73, and with *Teague's* exception for "watershed" rules of procedure. *Id.* at 273-74; *Danforth v. State*, 718 N.W.2d 451, 457-61 (Minn.Sup.Ct.2006).

[12] Moreover, by hypothesis, state prisoners who are in a position to advance claims that *Teague* (if raised) would bar from federal court must have exhausted the avenues for litigating those claims in state court. It is a fair inference that, in some number of cases, state courts have previously chosen to hear claims that *Teague* would foreclose in federal court, thus setting up occasions for state's attorneys to waive *Teague* and address the same claims when cases reach federal habeas. The operation

To impose *Teague* on state courts in the absence of federal interests would depart dramatically from the body of precedents the Court has developed to orchestrate federal-state relations in this field. In some instances, the Court has analyzed the federal and state interests at stake and concluded that state interests are paramount. Accordingly, the Court has concluded that state law governs in state proceedings at the sacrifice of federal interests. The Court has held, for example, that federal habeas courts must ordinarily give effect to state procedural grounds for cutting off federal claims. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Yet the Court has never held that state courts *must* employ strict default arrangements and cannot choose, instead, to reach the merits of federal claims. In *Uttecht v. Brown*, 551 U.S. ___, 127 S.Ct. 2218 (2007), for example, the Court noted that state law did not require a defendant to object to a prosecutor's use of peremptory challenges and that there was "no independent federal requirement" to object that the state court was obligated to recognize. *Id.* at 2229 (explaining that "state procedural rules govern"). If a state court itself concludes that state interests do not outweigh federal interests, and federal rights are thus enforced in state court, there is no plausible argument for imposing an alternative federal doctrine that would defeat federal claims. Cf. *Smith v. Texas*, ___ U.S. ___, ___, 127 S.Ct. 1686, 1703 (2007) (Alito, J., dissenting) (noting that a state court ordinarily has "no legal obligation to consider a preliminary nonmerits issue" and may choose "to bypass the preliminary issue and rest its decision on the merits").

This pattern is repeated in a host of other settings. The Court acknowledged in *Washington v. Recuenco*, ___ U.S. ___, 126 S.Ct. 2546 (2006), that the State of Washington might well have a more prisoner-friendly

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of *Teague* in federal court is thus perfectly consistent with the existence of a less rigid choice-of-law doctrine in state court.

harmless-error doctrine that would upset a conviction in circumstances in which the standard applied in federal habeas corpus proceedings would not. *Id.* at 2551 n.1. And in *Johnson v. United States*, 544 U.S. 295 (2005), the Court explained that while Georgia might have established a filing deadline to cut off state post-conviction consideration of a federal claim, Georgia had elected, instead, to entertain the claim. *Id.* at 309.[13]

The Court has read certain federal statutes to make demands of litigants in state proceedings over and above the requirements that state law imposes. Those statutes do not prevent state courts from reaching the merits of federal claims, but forestall or postpone the consideration of claims in *federal* court. Of course, in those instances the Court deferred to what it regarded as legislative policy ascribed to Congress. The *Johnson* case is an illustration. *Id.* at 308 (majority opinion) (explaining that a federal "diligence" requirement operating on litigants in state court was essential to implement a "statutory mandate" regarding the filing deadline for a federal petition). Cf. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (requiring state prisoners to present federal claims in a discretionary petition to the state's highest court because the relevant federal statute demanded that prisoners exhaust any "available" state procedure before going to federal court). On no account did the Court itself presume to superintend state court practices.

To be sure, local arrangements peculiar to individual states necessarily produce different results in factually similar cases. But variations of that sort are necessarily entailed in

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[13] The Court has acknowledged similar federal claim-preserving state practices in other contexts. A state is not obligated to employ federal constitutional standing doctrine to determine who can advance federal claims in state court. That doctrine responds to federal separation-of-powers concerns that do not exist in state proceedings. Accordingly, a state is free to formulate its own standing rules, which admit litigants to state court who could not press federal claims in federal court. *ASARCO v. Kadish*, 490 U.S. 605, 617 (1989) (explaining that this result "follows from the allocation of authority in the federal system").

federalism. It is a mistake to expect the bifurcated American justice system to generate uniformity in every instance, and a mistake to believe that disuniformity, when it occurs, is necessarily a bad thing. Disuniformity may, instead, be a function of differing judgments about the state interests implicated, and in many instances states may prefer to advance federal interests in the enforcement of federal rights. There are cases in which powerful federal interests justify forcing state courts to employ federal standards for doing federal-question business in state court. This case, by contrast, is one in which no federal interests would be served by doing so. Indeed, federal interests would be sacrificed to state interests that, by hypothesis, the state court concerned regards as insufficient.

Variations in results among different states, produced by variations in state choice-of-law doctrines employed in state post-conviction proceedings, do not threaten a uniform body of federal constitutional law. If that were true, then differing state arrangements for procedural default, harmless error, or filing periods would be equally objectionable. Decisions on the *merits* of federal claims must conform to a single, accurate standard. But results in similar cases routinely vary in different jurisdictions, when state courts follow their own local practices for deciding whether to *reach* the merits.

CONCLUSION

For the reasons stated above, the judgment below should be vacated and the case remanded to the Minnesota Supreme Court for further proceedings, with the explanation that the state court is not obligated to employ the *Teague* choice-of-law doctrine to determine whether to consider this Court's decision in *Crawford* as it examines Mr. Danforth's federal claim.

Respectfully submitted,

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No. 06-8273

IN THE

Supreme Court of the United States

STEPHEN DANFORTH,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Are state courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether decisions of this Court apply retroactively in state post-conviction proceedings?

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In The Supreme Court of the United States

STEPHEN DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ Of Certiorari
To The Supreme Court Of Minnesota

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF NEITHER PARTY

INTEREST OF THE *AMICI* STATES

Under the Constitution, the States determine the procedures and substance of any post-conviction remedies they choose to provide. States in fact have developed a diverse array of post-conviction proceedings, and state inmates file post-conviction actions with frequency. The fundamental question in this case—whether the Constitution dictates the procedures, substance and remedies the States must provide in post-conviction actions—goes to the very heart of federalism. Thus, the States have a substantial interest in the resolution of this case, both as a practical matter and as a matter of constitutional principle.

STATEMENT

1. Petitioner was convicted of first-degree criminal sexual conduct in violation of Minnesota law in 1996, resulting from petitioner's sexual abuse of a 6-year-old boy. Pet. App. A-2. The victim was found incompetent to testify at trial, but the trial court admitted into evidence a videotape of the victim being interviewed at a sexual abuse center. In that tape, the victim identified petitioner as his abuser. *Id.*

2. Petitioner unsuccessfully appealed his conviction, which became final in 1999. Pet. App. A-2. Petitioner then filed an unsuccessful state post-conviction petition. *Id.* After this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), petitioner filed a second state post-conviction petition, alleging that he was entitled to retroactive relief under *Crawford*. *Id.* at A-2. After the lower courts denied relief, the Minnesota Supreme Court granted review.

. In the Minnesota Supreme Court, petitioner argued that the state supreme court could give *Crawford* broader retroactive effect than would result from applying the doctrine this Court adopted for federal habeas proceedings in *Teague v. Lane*, 489 U.S. 288 (1989). Pet. App. A-3. The Minnesota Supreme Court rejected petitioner's argument and denied his claim. The court held that "[w]e reaffirm our holding [in a prior case] that we are required to apply *Teague's* principles when analyzing the retroactivity of a rule of federal constitutional criminal procedure." *Id.* The court further held that, applying *Teague*, *Crawford* is not retroactive, the same conclusion this Court reached recently in *Whorton v. Bockting*, 549 U.S. ___, 127 S. Ct. 1173 (2007).

SUMMARY OF THE ARGUMENT

The Constitution does not compel nor require the States to provide post-conviction processes or remedies at all. Once a State provides a constitutionally sufficient trial and direct appeal, its federal constitutional obligations are satisfied. State post-conviction proceedings, from a federal constitutional standpoint, are a matter of state grace not of federal right. Necessarily, it follows that the Constitution generally does not dictate the procedures, substance or remedies of such proceedings when a State chooses to provide them.

There is no constitutional command that the States follow federal habeas corpus doctrines such as the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989). Nor is there a constitutional bar to the States developing their own retroactivity doctrines for state post-conviction proceedings, whether those doctrines are broader or stricter than a federal habeas counterpart such as *Teague*. So long as state courts make that decision as a matter of state law, there is no federal interest nor federal constitutional principle at stake.

The State *amici* support neither party in this case because both parties' filings to date fail to respect fully the overriding federalism principle at stake here. The petitioner argues that States can give only *broader* but not *narrower* retroactive effect to Supreme Court decisions than would be the case applying *Teague*. And the respondent has argued that state courts must strictly follow *Teague*, with no departures. Both positions are wrong in part.

1. A. State post-conviction proceedings, with respect to federal law, are a matter of state grace not of federal right. Indeed, there is no federal constitutional barrier to a State abolishing state post-conviction proceedings altogether. In this context, the greater power includes the lesser. States can limit what decisions they apply retroactively in their own post-conviction proceedings, or recognize no retroactivity at all. In appropriate cases, the federal courts remain available

to grant federal habeas relief on the basis of this Court's new decisions.

B. States are free to *choose* the *Teague* retroactivity analysis for use in state post-conviction proceedings, but they are not constitutionally *compelled* to do so. Given the choice, many States may well decide that the *Teague* doctrine is appropriate and practical for use in their state post-conviction proceedings. But, as a matter of constitutional federalism principles, States are not required to reach that conclusion.

2. A. The Supreme Court of Minnesota's decision misapprehends the key legal distinction in the retroactivity context, which is "finality." This Court repeatedly has held that its decisions apply to any state criminal cases not yet "final," with "finality" being defined as conviction and completion of the direct review process. But once a state criminal conviction has become "final" for federal constitutional purposes, the Constitution demands no more from the States.

Thus, the Court's cases make clear that there is no constitutional authority to dictate retroactive application of new decisions to state criminal cases already "final." State court relief from a criminal conviction and sentence at that point is dependent on whether States choose to provide post-conviction remedies. Any constitutional "right" to post-conviction relief exists, if at all, only through federal habeas proceedings in federal court.

B. The cases on which the Minnesota Supreme Court primarily relied in holding that state courts must apply *Teague* are inapposite. Several are *civil* retroactivity cases. But civil retroactivity is simply inapposite, because in civil cases there are no "post-finality" proceedings, and the Court has made clear that its decisions do not and cannot reopen previously final judgments in civil cases. *See, e.g., American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

Indeed, the Court has held that the Constitution bars Congress from reopening previously final judgments in civil cases. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995). The clear and simple holding of the Court's civil retroactivity cases is only that the Court's civil decisions must be applied to *non-final* civil cases.

3. Apart from the structure inherent in the Constitution, several factors suggest that *Teague* retroactivity is not a constitutionally-compelled doctrine. First, *Teague* itself arose in the context of a federal habeas proceeding, not a state post-conviction proceeding, and there are significant constitutional and other differences between federal and state post-conviction proceedings. Second, this Court has held that *Teague* is not "jurisdictional" in the sense that a court must *sua sponte* address *Teague* retroactivity if the State fails to raise it in defending a petition seeking federal habeas relief. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). Third, if the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, legitimately altered the *Teague* doctrine in any respect, that would mean *Teague* is not a constitutional requirement, just as most aspects of federal habeas corpus doctrine are not constitutionally compelled. Indeed, Congress retains broad power to define and limit federal habeas corpus relief, as this Court repeatedly has recognized.

ARGUMENT

I. STATE POST-CONVICTION PROCEEDINGS ARE NOT A FEDERAL CONSTITUTIONAL RIGHT.

A. There Is No Federal Constitutional Right To State Post-Conviction Proceedings, Nor Even A Direct Appeal, In State Criminal Cases.

The Constitution does not require the States to provide post-conviction processes or remedies at all. Once a State provides a constitutionally sufficient trial and direct appeal, its federal constitutional obligations are certainly satisfied.

This Court has declared or suggested on several occasions that even a direct appeal may not be constitutionally required. *See, e.g., Fry v. Pliler*, 127 S. Ct 2321, 2326 (2007) (discussing what harmless error standard would apply in federal habeas proceedings "if a State *eliminated appellate review altogether*"); *Abney v. United States*, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal. Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.").

That proposition has been express—not just implicit—for over a century. In *McKane v. Durston*, 153 U.S. 684, 687 (1894), the first Justice Harlan declared that "review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law." If due process does not require the States to provide direct appeals in criminal cases, then surely it does not compel them to create post-conviction proceedings.

Rather, state post-conviction proceedings are a matter of state grace not of federal right. "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). Thus, the States "have no obligation" to provide post-conviction relief at all. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). "[T]here is no constitutional mandate that" states provide post-conviction review. *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 402-403 (2001) (citations omitted).

The Court has more than once explained the reasons for this constitutional principle: "Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself,

and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction." *Finley*, 481 U.S. at 556-557; *see also Murray*, 492 U.S. at 13 (O'Connor, J., concurring) ("A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . .").

The distinction between trial/direct review and post-conviction proceedings underlies the Court's decisions holding that there is no constitutional right to counsel in state post-conviction proceedings generally, *Finley*, 481 U.S. 551, nor even in capital cases. *Murray*, 492 U.S. 1. In fact, the Court has even declined to find a constitutional right to counsel on direct review when the proceeding for which counsel is sought is discretionary, *Ross v. Moffitt*, 417 U.S. 600 (1974), rather than mandatory under state law. *Cf. Evitts v. Lucey*, 469 U.S. 387 (1985) (due process includes a right to counsel when state law gives convicted defendant a mandatory right to direct review).

Thus, both expressly and by implication, this Court's decisions make clear two very important propositions for this case: First, the Constitution does not require that the States provide any post-conviction proceedings at all. Second, constitutional rights that apply to a criminal trial and mandatory direct review do not automatically apply to post-conviction proceedings, and not even to direct review proceedings when they are discretionary.

B. States Are Free To Structure Their State Post-Conviction Proceedings As They Choose.

Because state post-conviction proceedings are a matter of state grace and not of federal right, there is no federal constitutional barrier to a State abolishing post-conviction proceedings altogether. Further, in the post-conviction

context, the greater power, to abolish the process, includes the lesser—to limit and restrict the grounds on which relief may be sought. Thus, the States necessarily retain broad discretion to set the terms and conditions on which their courts may grant post-conviction relief pursuant to the proceedings that state law creates.

The Court has on several occasions recognized this fundamental principle, declaring that it would "not question the State's power, in post-conviction proceedings, to reallocate the respective burdens of the individual and the State and to delimit the scope of state appellate review." *Drope v. Missouri*, 420 U.S. 162, 174 (1975). Similarly, the Court has declared that it is "unwilling to accept" the contention "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." *Finley*, 481 U.S. at 559; *see also Coleman v. Thompson*, 501 U.S. 722, 745-747 (1991) (emphasizing the importance of permitting the States to regulate their own post-conviction proceedings). Individual members of the Court, likewise, have emphasized that the States have "wide discretion to select appropriate solutions" in post-conviction proceedings, *Murray*, 492 U.S. at 14 (Kennedy, J., concurring), and that "[n]othing in the Constitution requires the States to provide such proceedings, nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings." *Id.* at 13 (O'Connor, J., concurring).

Not surprisingly, the States have developed a diverse array of post-conviction proceedings, with a variety of limitations on what claims are cognizable and under what standards relief may be granted. Indeed, the States are not even uniform in their conception of the basis for recognizing post-conviction relief, with some making such relief available by writ of habeas corpus, others using remedies similar to the writ of coram nobis, and yet others relying on proceedings that do not fit the two previous categories. *See generally*

LARRY W. YACKLE, POSTCONVICTION REMEDIES 13 (1981 & Cum. Supp. 2006/2007) (surveying state post-conviction proceedings). Furthermore, both the claims cognizable and the standards for granting relief vary dramatically among the States. *See id.*

Thus, unless this Court is to overrule more than a century of precedent, it follows as a matter of recognized constitutional principle that States are free to apply their own retroactivity doctrines in post-conviction proceedings. And that choice is a two-way street, including several options: States can create their own retroactivity doctrines that are either broader *or narrower* than *Teague*, or they may decline to recognize retroactivity at all. *See, e.g., Linkletter v. Walker*, 381 U.S. 618, 629 (1965) (the Constitution neither prohibits nor requires that new decisions be given retroactive effect in collateral proceedings). Given the choice, many States may well decide that the *Teague* doctrine is appropriate and practical for use in their post-conviction proceedings. But, as a matter of constitutional federalism principles, States are not required to reach that conclusion.

This Court's decisions long have made clear that the States have "substantial discretion", *Finley*, 481 U.S. at 559, to develop and implement post-conviction proceedings. That discretion necessarily includes choices regarding whether to apply new decisions of this Court retroactively to state convictions that have become "final." States are free to choose the *Teague* retroactivity analysis for state post-conviction proceedings, but they are not constitutionally compelled to apply *Teague*.

Rather, so long as state courts in post-conviction proceedings make retroactivity decisions as a matter of state law, there is no federal interest nor federal constitutional principle at stake, and nothing for this Court to review. That result is inherent in federalism. Irrespective of the retroactivity doctrine state courts may choose, the federal courts remain available to grant federal habeas relief on the

basis of this Court's new decisions in appropriate cases. Federal interests can and will be vindicated where and when appropriate, but the Constitution does not dictate that such interests be vindicated in state post-conviction proceedings.

II. THE CONSTITUTIONAL DETERMINANT IN RETROACTIVITY CASES IS WHETHER STATE CRIMINAL PROCEEDINGS ARE "FINAL."

A. The Supreme Court Of Minnesota Misunderstood The Principle Of "Finality."

The Supreme Court of Minnesota's decision misapprehends the key legal distinction in the retroactivity context, which is "finality." This Court has held that its decisions apply to any state criminal cases not yet "final," with "finality" defined as conviction and completion of the direct review process. *See, e.g., Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

Once "finality" has been reached in state criminal cases, there is no constitutional authority to dictate retroactive application of new decisions. Rather, "'the Constitution neither prohibits nor requires retrospective effect'" in that instance. *Griffith*, 479 U.S. at 320 (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)).

The Court has divined a constitutional basis for requiring the application of its decisions to all cases not yet final, reasoning that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. But once a state criminal conviction has become "final" for federal constitutional purposes, the Constitution demands no more from the States.

"Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality." *Teague v. Lane*, 489 U.S. 288, 309 (1989). State court relief from a criminal conviction and sentence after a case is "final" is dependent on whether States choose to provide post-conviction remedies. Any

constitutional "right" to post-conviction relief exists, if at all, only through federal habeas proceedings in federal court.

The cases on which the Supreme Court of Minnesota primarily relied in holding that state courts must apply *Teague* are inapposite. Several are *civil* retroactivity cases. But civil retroactivity is simply inapposite, because in civil cases there are no "post-finality" proceedings, and the Court has made clear that its decisions do not and cannot reopen previously final judgments in civil cases. *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). Indeed, the Court has held that the Constitution bars Congress from reopening previously final judgments in civil cases. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995).

The Supreme Court of Minnesota appears to have been confused by language in *American Trucking* indicating that the retroactivity determination "is a matter of federal law." 496 U.S. at 177. But this Court in *American Trucking* made that assertion in the context of determining whether a decision would apply to *civil cases* that were *not yet final*. A careful reading of this Court's statements in *American Trucking* makes clear that all the Court said is that the question whether a decision of this Court applies to cases still pending (i.e., not yet final) is a matter of federal law, a proposition that no one in this case contests. The cases this Court cited for that proposition are all cases involving retroactivity in terms of whether a decision of this Court must be applied to *still pending* cases. This Court did not, and would not, cite any case involving *Teague* or post-conviction/post-finality review, even though *American Trucking* was decided after *Teague*, and the decisions are authored by the same Justice.

The simple current rule of this Court's civil retroactivity cases is that the Court's decisions must be applied to all *non-final* civil cases. That determination is a matter of federal law, and that rule is a federal rule. But nothing in the

Court's civil retroactivity cases suggests that new civil decisions can reopen previously final judgments; indeed, *Plaut* is directly to the contrary. And nothing in the civil retroactivity cases suggests that the question whether a new decision applies in state post-conviction proceedings is a matter of federal law. The Minnesota Supreme Court simply erred in its reading of the import and significance of *American Trucking*.

B. This Court Has Never Held That Its Decisions Must Be Applied Retroactively In State Post-Conviction Proceedings.

The only case on which the Supreme Court of Minnesota relied as expressly holding that this Court's retroactivity doctrine applies in state post-conviction proceedings is *Michigan v. Payne*, 412 U.S. 47 (1973). But the Minnesota Supreme Court's reliance on *Payne* is misplaced on the facts: *Payne* was a direct appeal and therefore the case was not "final" for retroactivity purposes. Furthermore, this Court's decision in *Payne* was itself arguably wrong in light of the Court's later criminal retroactivity decisions such as *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Teague*. In any event, a careful reading of *Payne* does not support the conclusion that *Teague* controls retroactivity in state post-conviction proceedings.

In *Michigan v. Payne* the defendant pled guilty in 1963 to a charge of assault with intent to commit murder, and he was sentenced to a prison term of 19 to 40 years. 412 U.S. at 47-48. Several years later, the Michigan courts set aside the defendant's plea and sentence, concluding that his confession and plea were involuntary. *Id.* at 48. In 1967, Payne was tried, a jury found him guilty, and the trial judge sentenced him to a prison term of 25 to 50 years. *Id.* The Michigan Court of Appeals affirmed the conviction and sentence.

But on direct appeal the Michigan Supreme Court reversed Payne's sentence, in light of this Court's decision in

North Carolina v. Pearce, 395 U.S. 711 (1969), which had been decided while Payne's direct appeal was pending. *Pearce* held that due process precludes courts from resentencing defendants to a higher sentence in retaliation for a defendant appealing a conviction or sentence. *Id.* at 725. *Pearce* further adopted prophylactic limitations applicable whenever a judge imposes a more severe sentence following a retrial. Those measures include that the trial judge set forth on the record the reasons for a higher sentence, and that such reasons be based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726.

The Michigan Supreme Court applied *Pearce* to Payne's appeal "pending clarification" by this Court regarding the "retroactivity" of *Pearce*. This Court granted certiorari to review that decision. The Court concluded that the fundamental due process rule of *Pearce*—that a judge may not resentence a defendant more severely in retaliation for challenging the original conviction or sentence—was not a "new" constitutional rule and therefore was "available equally to defendants resentenced before and after the date" *Pearce* was decided. *Payne*, 412 U.S. at 50-51. Applying the three-factor retroactivity test of *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court concluded that the prophylactic requirements of *Pearce* were not retroactive and did not apply to Payne, whose resentencing occurred prior to the date the Court decided *Pearce*.

With all due respect, the Court's conclusion in *Payne* that the procedural requirements of *Pearce* did not apply retroactively to Payne simply does not square with the Court's later decisions in *Griffith* and *Teague*. Indeed, Payne's case was *on direct appeal* when this Court decided it. Under *Griffith*, the *Pearce* decision's rules and procedures should have been applied to Payne's direct appeal, no matter

whether those rules and procedures were considered "new" or "old."

More importantly, for purposes of this case, nothing in *Michigan v. Payne* suggests—or indeed could suggest—that state courts are bound to apply the Court's federal habeas retroactivity doctrine (*Teague*) in state post-conviction proceedings. That principle simply was never in issue in *Payne*, which was a direct appeal in state court, not a post-conviction proceeding.

Furthermore, because the Michigan Supreme Court purported to rely on federal law in determining whether to apply *Pearce*, it was that reliance on federal law which arguably gave this Court jurisdiction to decide the case, even though under now well-grounded retroactivity principles, both the Michigan Supreme Court and this Court wrongly treated *Payne* as a retroactivity case at all. In any event, nothing in *Payne* holds or suggests that the Michigan Supreme Court could not have reached a different conclusion under state law.

III. *TEAGUE* RETROACTIVITY IS NOT A CONSTITUTIONAL REQUIREMENT.

Apart from the structure inherent in the Constitution, several factors suggest that *Teague* retroactivity is not a constitutionally-compelled doctrine. Indeed, the *amici* States are aware of no case in which any member of this Court has suggested that *Teague* retroactivity is constitutionally compelled. Nor has the Court questioned that Congress has the power to alter, amend, extend or eliminate the *Teague* doctrine.

1. *Teague* itself arose in the context of a federal habeas corpus proceeding, not a state post-conviction proceeding, and there are significant constitutional and other differences between federal and state post-conviction proceedings. Repeatedly, in its cases addressing *Teague*, even after the enactment of AEDPA, this Court has spoken of *Teague* retroactivity as an aspect of the Court's "habeas corpus"

jurisprudence, and as a doctrine that "federal courts" must follow in habeas cases. *See, e.g., Horn v. Banks*, 536 U.S. 266, 267 (2002) (*per curiam*) ("federal courts must address the *Teague* question when it is properly argued by the government").

In the oral argument of a recently decided case, *Whorton v. Bockting*, 127 S. Ct. 1173 (2007), Justice Kennedy asked "[w]hat is the source of the rule in *Teague*? Could Congress overturn the rule in *Teague* if it wanted to and say that nothing is retroactive or that everything is retroactive?" *Whorton v. Bockting*, No. 05-595, Oral Arg. Tr. at 7. The short answers to Justice Kennedy's questions are (1) *Teague* is grounded in the Court's equitable powers in federal habeas cases and (2) "Yes", Congress could eliminate or compel retroactivity in federal habeas proceedings. Speaking to the lawyer arguing the case, Justice Scalia suggested that "[h]abeas is equitable relief and the Court has a lot of discretion in identifying the boundaries of equitable relief, doesn't it? I assume that's how we got to *Teague*." Oral Arg. Tr. at 8.

2. This Court has held that *Teague* is not "jurisdictional" in the sense that a court must sua sponte address *Teague* retroactivity if a State fails to raise it in federal habeas proceedings. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not jurisdictional in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte."); *see also Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it.").

3. If Congress legitimately altered the *Teague* doctrine when it enacted AEDPA, then *Teague* cannot be a constitutional requirement, just as most aspects of federal habeas corpus doctrine are not constitutionally compelled. Furthermore, though members of this Court have

disagreed—as a matter of interpreting AEDPA—on the questions whether and, if so, to what extent the statute codified, amended, extended or eliminated the *Teague* doctrine, no member of the Court appears to question the proposition that Congress has the power to alter the doctrine legislatively, meaning that *Teague* itself has no constitutional basis.

A prime example is *Williams v. Taylor*, 529 U.S. 362 (2000), in which the Court divided over the scope and effect of AEDPA, in part with respect to *Teague*. In a part of the opinion that spoke for a plurality of four Justices, there are numerous statements indicating that Congress is free to alter or amend the *Teague* doctrine. For instance, the plurality opinion states that *Teague* "is the functional equivalent of a *statutory* provision commanding exclusive reliance on clearly established law," *id.* at 379 (emphasis added), and that "[i]t is perfectly clear that AEDPA *codifies Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." *Id.* at 380 (emphasis added). In footnotes, the plurality observed that "[i]t is not unusual for Congress to codify earlier precedent in the habeas context," *id.* at 380 n.11, and that AEDPA's provisions "make it impossible to conclude that Congress was not fully aware of, and interested in codifying into law, that aspect [*Teague*] of this Court's habeas doctrine." *Id.* at 380 n.12.

* * * * *

Ultimately, whether the issue is the appropriate harmless error standard to apply, the choice of retroactivity doctrine, whether certain allegations such as Fourth Amendment violations or freestanding assertions of "actual innocence" are cognizable in post-conviction proceedings, or whether claims are procedurally barred from consideration on the merits, the States are free to structure their post-conviction proceedings as they wish, or even to dispense with such proceedings. *Teague* and its progeny reinforce rather than

undermine that conclusion: "The *Teague* cases reflect this Court's view that habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams*, 529 U.S. at 383 (plurality opinion).

Thus, under fundamental federalism principles, the Supreme Court of Minnesota in fact was not bound to follow *Teague*. Rather, it had several options, ranging from declining to apply any decisions of this Court retroactively, to choosing to adopt *Teague*, to creating its own retroactivity doctrine for Minnesota post-conviction proceedings. Whether some choices on that spectrum would be wise or ill-considered is not the constitutional question. Rather, the Constitution makes state post-conviction proceedings a matter of state grace, not of federal right. Thus, as Justice Cardozo once declared with regard to state supreme courts' choices regarding retroactivity under state law, "the federal constitution has no voice upon the subject." *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932). Federalism demands no less.

CONCLUSION

The Supreme Court of Minnesota erred when it concluded that it is constitutionally compelled, in state post-conviction proceedings, to follow the retroactivity doctrine this Court adopted in *Teague v. Lane* for federal habeas corpus proceedings. Accordingly, that court's decision should be vacated, and the case remanded for further proceedings.

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STEPHEN DANFORTH,
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v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether *Teague* v. *Lane*, 489 U.S. 288 (1989), which provides a "retroactivity" rule for federal habeas actions, deprives States and state courts of authority to decide what remedial effect "new" constitutional rules should be given in their own state post-conviction proceedings.

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Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* (5th ed. 2003) 28

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Dallis H. Oaks, *Habeas Corpus in the States*, 32 U. Chi. L. Rev. 243 (1965) 18

IN THE

Supreme Court of the United States

NO. 06-8273

STEPHEN DANFORTH,

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STATE OF MINNESOTA,

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On Writ of Certiorari
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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

National Association of Criminal Defense Lawyers (NACDL) is a nonprofit national bar association that works in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and due process for persons accused of crimes and to foster the integrity, independence, and expertise of the criminal defense profession. NACDL has more than 12,500 members—joined by 90 affiliate organizations with 35,000 members—including criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL and its members have a strong interest in ensuring that state courts are not precluded from applying, in their own post-conviction proceedings, broader remedial

principles than those that constrain federal courts in reviewing the legality of state-court convictions.[1]

STATEMENT OF THE CASE

This case concerns whether the State of Minnesota has authority, when adjudicating a claim for post-conviction relief under a state-law cause of action, to give the claimant the benefit of developments in constitutional law that occurred after his conviction became final.

1. In 1996, petitioner Stephen Danforth was tried in Minnesota state court for first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a)(1994), based on the alleged sexual abuse of a minor. J.A. 6-7. At trial, the court concluded that the minor was incompetent to testify and admitted, over Danforth's objection, a videotaped interview in which the minor accused Danforth of the abuse. J.A. 7.

Danforth challenged the admission of the videotaped statement on appeal, urging that it violated his Sixth Amendment right to confront the witnesses against him. J.A. 32. The court of appeals affirmed, J.A. 29, and the Minnesota Supreme Court denied further review, J.A. 30. On September 9, 1999, Danforth filed a petition for state post-conviction relief, which was also denied. J.A. 32-34.

2. Four years later, this Court decided *Crawford* v. *Washington*, 541 U.S. 36 (2004), holding that the Sixth Amendment "impose[s] an absolute bar to [the admission of] statements that are testimonial, absent a prior opportunity to cross examine [the declarant]." *Id.* at 60. Danforth

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[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

filed a second petition for state post-conviction relief, citing *Crawford*. J.A. 34. The district court denied the petition, J.A. 35, and the Minnesota Court of Appeals affirmed, J.A. 41.

The Minnesota Supreme Court granted Danforth's petition for review, but upheld the denial of relief. J.A. 44. The Minnesota court did not reach the merits of Danforth's Confrontation Clause claim under *Crawford*, holding that *Teague* v. *Lane*, 489 U.S. 288 (1989), precluded it from applying *Crawford*'s "new" rule retroactively in state post-conviction proceedings. The court rejected Danforth's contention that state courts have authority to offer their citizens greater protections than those that would be available in a federal habeas action, and that state courts therefore can apply *Crawford* to a broader class of cases than those eligible for relief under *Teague*. The court recognized that the *Teague* framework "is based, in part, on concerns unique to federal habeas corpus." J.A. 47. But it concluded that it was "compelled to follow the lead of [this] Court in determining when a decision is to be afforded retroactive treatment," J.A. 45, and that it was "not free to fashion [its] own standard for retroactivity for *Crawford*." J.A. 47. The court then concluded that *Crawford* qualifies as a "new" rule under *Teague* that cannot be given retroactive effect. J.A. 51-54.[2]

On May 21, 2007, this Court granted Danforth's petition for a writ of certiorari to determine whether the rule established in *Teague* v. *Lane* is concerned solely with the scope of federal habeas or instead limits the authority of

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[2] After the Minnesota Supreme Court issued its decision, this Court decided *Whorton* v. *Bockting*, 127 S.Ct. 1173 (2007)—a case arising in the federal habeas context—which likewise concluded that *Crawford* does not qualify for retroactive treatment under *Teague*. Consequently, the only issue in this case is whether *Teague* precludes state courts from choosing to apply *Crawford* in state habeas proceedings to convictions that became final before *Crawford* was decided.

state courts to grant relief in their own post-conviction proceedings. 127 S.Ct. 2427.

SUMMARY OF ARGUMENT

The sole question in this case is whether federal law requires States to apply *Teague* v. *Lane*, 489 U.S. 288 (1989), to narrow the relief they can offer their own prisoners in their own post-conviction proceedings. It does not.

I. *Teague* is a remedial principle that regulates the scope of the *federal* habeas writ. *Teague* itself, this Court's decisions applying it, the decisions on which *Teague* is based, and the history of the Court's habeas jurisprudence all make that clear.

A. *Teague* does not purport to announce a constitutional rule. Rather, *Teague* makes plain that it establishes a remedial principle that, for reasons of equity, limits the relief a *federal* habeas court may provide. *Teague* attempts to accommodate the particular equitable concerns that arise when a federal court is asked to intrude upon an otherwise final state-court conviction. Citing these concerns, *Teague* concludes that where a state court has provided a reasonable (albeit mistaken) application of then-existing constitutional precedent, the extraordinary remedy of a federal habeas writ is not warranted. The concerns of comity and respect for state interests that undergird *Teague* cannot justify imposing its rule on unwilling States, forcing them to displace the remedial principles they would otherwise apply in their own courts when considering whether to grant post-conviction relief from their own criminal judgments.

B. History confirms that *Teague* is meant to apply to federal habeas only. Indeed, while this Court has continually refined the scope of the *federal* habeas writ, it has only in the rarest of circumstances had anything to say about the appropriate scope of *state* post-conviction relief. It is

improbable in the extreme that *Teague* would have deviated from that longstanding practice without even acknowledging that it intended to do so.

II. Even if the Court were inclined to extend *Teague* beyond its original meaning and to force the States to deny relief for putatively "new" rules of constitutional law, there would be no federal-law basis for doing so.

A. One searches in vain for any constitutional grounding for the *Teague* rule. Indeed, any attempt to characterize *Teague* as a constitutional rule that describes what the substance of federal law is, or was, at any particular time would require this Court to adopt a nakedly positivist understanding of constitutional law—namely, that this Court actually *makes* that law rather than merely *discovers* what it is and always has been. That is a view that this Court has never embraced and which many of its members have roundly rejected. *Teague* cannot and need not be read as incorporating it. Instead *Teague* is properly understood as a rule that distinguishes those convictions that warrant the remedy of federal habeas from those that do not.

B. Nor does *Teague* identify any federal interests that would warrant displacing a State's own judgment about the scope of constitutional violations it wishes to remedy in its own post-conviction processes. To the contrary, *Teague*'s principal concerns are comity and respect for the States. It is hard to see how those interests are furthered by prohibiting a State that chooses to do so from giving full remedial effect to this Court's decisions. Allowing a state court the liberty to apply its best and most current understanding of federal law in its own state post-conviction proceedings is a triumph of comity, not a defeat.

C. Finally, contrary to the conclusion of the Minnesota Supreme Court, this Court's jurisprudence on questions of civil retroactivity actually confirm that *Teague* is best understood *not* as a constitutional rule with which the

States must comply, but as a remedial principle that limits, for reasons of equity, the relief a federal habeas court can provide.

ARGUMENT

Teague v. *Lane*, 489 U.S. 288 (1989), narrows the circumstances in which federal courts, acting under the federal habeas statute, 28 U.S.C. § 2254, may overturn an otherwise final state court conviction. Invoking the retroactivity formulation proposed by Justice Harlan for federal habeas cases in *Mackey* v. *United States*, 401 U.S. 667, 688-695 (1971) (concurring in part and dissenting in part), and *Desist* v. *United States*, 394 U.S. 244, 262-269 (1969) (dissenting opinion), *Teague* ruled that federal courts should neither announce nor apply "new" constitutional rules of criminal procedure on federal habeas. Under *Teague*, a rule is deemed "new" and therefore unavailable on federal habeas unless the rule was "*dictated* by precedent" when the petitioner's conviction became final. 489 U.S. at 301; *Graham* v. *Collins*, 506 U.S. 461, 467 (1993).

Contrary to the decision below, *Teague* is not a rule of federal law that binds state courts and precludes them from offering more generous relief in their own post-conviction proceedings. It is instead a federal remedial rule specifically adapted to the *federal* habeas statute, 28 U.S.C. § 2254, in an attempt to reflect the principles of equity that govern the availability of relief under that statute. That is clear from the reasoning of *Teague* and from the separate opinions of Justice Harlan in *Mackey* and *Desist*, on which *Teague*'s framework is based. It is also clear from the principles *Teague* invokes, including federalism, comity, and respect for States and state courts. Those principles counsel respect for the choices States make when calibrating their own post-conviction remedies—not the establishment of a federal rule to supersede legitimate state choices among competing remedial policies.

History likewise confirms that *Teague* announces a remedial principle that governs *federal* habeas and not state proceedings. This Court has, throughout its history, adjusted the scope of federal habeas in light of its equitable origins in an effort to ensure that the writ serves its highest purposes without undue intrusion into state processes. The Court has never, however, taken it upon itself to impose federal principles of equity to preclude States from offering their citizens more generous post-conviction remedies in their own courts under state causes of action.

There is, moreover, no plausible federal-law basis for imposing *Teague* on the States. The only arguable *constitutional* basis for *Teague* is a positivist view that this Court's decisions, rather than "finding" and "articulating" the law, actually "make" it. Many members of this Court have resisted that understanding of the judicial role, and *Teague* cannot and need not be read as incorporating it. Rather, the language of "retroactivity" in *Teague* is best understood not as a retroactivity rule, but as a method (however effective) for distinguishing state-court decisions that deserve respect as good-faith applications of constitutional law from those that, based on the equities, truly warrant federal relief. Indeed, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which largely incorporates *Teague*'s standard, does so without using the language of retroactivity at all.

I. *TEAGUE* IS A REMEDIAL PRINCIPLE DESIGNED TO REGULATE THE SCOPE OF THE *FEDERAL* HABEAS WRIT

This Court has long broadened and narrowed the scope of *federal* habeas relief in an attempt to accommodate equitable considerations—including fundamental fairness, comity, federalism, and the States' interest in the finality of their criminal judgments. Invoking those principles, *Teague* attempts to honor the basic purpose of the federal habeas writ as an instrument of justice while accounting for

the unique concerns that arise when a federal court is asked to disturb a state-court conviction long since final on direct review. But nothing in *Teague* or its progeny suggests that it establishes, under the guise of equity, a rule that operates beyond the confines of federal habeas. Nor does *Teague* suggest that, far from accommodating state interests, it is meant to displace the States' remedial discretion in state post-conviction proceedings. In fact, the opposite is true.

A. *Teague* By Its Terms Represents An Adjustment To The Availability Of *Federal* Habeas Relief

Teague is a rule governing the scope of relief available under the *federal* habeas writ. That is apparent from *Teague*'s origins, its reasoning, and its progeny. As explained in greater detail below, this Court has long exercised the authority to adjust the scope of the *federal* writ in light of the equitable principles that govern its application. It has no such authority where state habeas is concerned.

1. *Teague* itself (like every decision of this Court applying *Teague*) arose on federal habeas under 28 U.S.C. § 2254. That procedural posture was not merely a background fact. It was the "frame of reference" that dictated the rule *Teague* announced. See *Teague*, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part)). As the *Teague* plurality explained, "[t]he relevant frame of reference" for determining the appropriate "retroactivity" rule for federal habeas is "*the purposes for which the writ of habeas corpus* is made available." *Ibid.* (emphasis added). As Justice Harlan put it, "the problem of retroactivity is in truth none other than one of *resettling the limits of the reach of the Great Writ.*" *Mackey*, 401 U.S. at 701-702 (emphasis added).

Those observations make clear that *Teague* was developed in an attempt to ensure that relief granted under *federal* habeas would be consistent with the purposes of and

the equitable considerations governing the availability of the *federal* writ. It is improbable that this Court would have presumed to "resettl[e] the limits" of *state writs* based on its own assumptions about the "purposes for which" the *States* make those writs available as a matter of *state law*. *Mackey*, 401 U.S. at 701; *Teague*, 489 U.S. at 306. The Court certainly would not have done so without any briefing from the affected States, an examination of state precedents, or an analysis of the history of state habeas. *Teague* thus "adopt[ed] Justice Harlan's view" about "the limits of the reach of" *federal* habeas. *Teague*, 489 U.S. at 310; *Mackey*, 401 U.S. at 702. It had nothing to say about what "the limits of the reach of" state post-conviction relief should be.

That *Teague* is addressed to federal habeas alone is clearer still from *Teague*'s progeny. Since adopting the rule set forth by the *Teague* plurality, *Saffle* v. *Parks*, 494 U.S. 484 (1990), this Court has repeatedly characterized it as a standard that limits the scope of *federal* habeas relief. See, *e.g.*, *Beard* v. *Banks*, 542 U.S. 406, 412 (2004) ("*Teague*'s non-retroactivity principle acts as a limitation on the power of *federal courts* to grant habeas relief to state prisoners.") (emphasis added) (internal quotation marks, citation, and alterations omitted); *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) ("The [*Teague*] nonretroactivity principle *prevents a federal court* from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final.") (emphasis added). This Court has never applied *Teague*'s limitation to cases arising on review of state habeas proceedings.[3]

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[3] Notably, in *Horn* v. *Banks*, 536 U.S. 266 (2002), this Court held that federal courts were obliged to apply *Teague* since it was properly raised by the State in response to a federal habeas petition, even though the Pennsylvania state courts had reached the merits of Banks's claim. *Id.* at 272. The Court gave no indication that the Pennsylvania courts themselves had erred in failing to apply *Teague*. Likewise, in *Bustillo* v.

2. *Teague* quite clearly is limited to federal habeas for yet another reason: the Court nowhere identified a constitutional principle, or some overriding federal interest, sufficient to justify imposing *Teague* on the States—much less for displacing the remedial rules the States might otherwise choose to apply in their own state proceedings. Instead, the Court based its new rule on equitable concerns that would seem to preclude—not mandate—forcing *Teague* upon unwilling States.

a. Foremost among the equitable concerns invoked by *Teague* are comity, federalism, and respect for the States. "State courts," *Teague* observed, "are understandably frustrated when they faithfully apply existing constitutional law *only to have a federal court discover*, during a [habeas] proceeding, new constitutional commands." 489 U.S. at 310 (emphasis added) (internal quotation marks and citation omitted). *Teague* chose to "foster[] comity between federal and state courts," *Gilmore* v. *Taylor*, 508 U.S. 333, 340 (1993), by seeking to "validat[e] reasonable, good-faith interpretations of existing precedents made by state courts," *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997) (citation omitted). Such comity-related concerns are, of course, entirely absent in state post-conviction proceedings, where state courts review their own judgments. It would make no sense to invoke principles of "federalism" and "comity"—which counsel respect for state policy determinations—as a reason to supersede a State's own determination about the scope of relief it wishes to grant in its own collateral proceedings.

Nevada's Supreme Court has, for example, chosen as a matter of policy *not* to apply *Teague* because it believes that applying its best understanding of current federal law in its

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Johnson, 126 S.Ct. 2669 (2006), this Court addressed an arguably novel interpretation of a federal treaty, even though that case arose on review of state collateral proceedings.

own collateral proceedings will better serve its interest in "encouraging the district courts of [Nevada] to strive for perspicacious, reasonable application of constitutional principles in cases where no precedent appears to be squarely on point." *Colwell* v. *Nevada*, 59 P.3d 463, 471 (2002). The federal interest in maintaining good relations with the States (in this case Nevada) would be undercut—not furthered—by forcing them to subjugate their balance of competing interests to a balance this Court has chosen.

The Court's opinion in *Johnson* v. *Fankell*, 520 U.S. 911 (1997), is instructive. In that case, the Idaho courts refused to allow state officials sued under 42 U.S.C. § 1983 to take an interlocutory appeal of an order denying summary judgment on qualified immunity grounds. *Id.* at 916. Relying on decisions of this Court authorizing interlocutory appeals of qualified immunity issues, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985), the officials argued that federal law should preempt Idaho's rule to protect the substantive right to immunity and "to avoid different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court." *Id.* at 918 (internal quotation marks and citations omitted). This Court rejected those arguments. It explained that "the ultimate purpose of qualified immunity is to *protect a State* and its officials from overenforcement of federal rights." *Id.* at 919 (emphasis added). That Idaho did not follow federal law in allowing interlocutory appeals was "less an interference with *federal* interests than a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense." *Id.* at 919-920 (emphasis in original). *Teague* is likewise intended primarily for the benefit of the States. As with the rules that attend the qualified immunity doctrine, if a State determines it is in its best interests to forgo *Teague*'s protections in its own courts, it should be permitted to do so.

b. In adopting *Teague*, the Court also invoked the States' interests in finality. Allowing "new" federal rules to be enforced in federal habeas, the Court believed, would "*continually* force[] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S. at 310. *Teague* noted the "costs imposed on the State[s] by retrospective application of new rules of constitutional law on habeas corpus." *Id.* (quoting *Solem* v. *Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in the judgment)). *Teague* is meant to "reflect [the Court's] enduring respect for the *State's* interest in the finality of convictions that have survived direct review within the state court system." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998) (quotation marks and citation omitted) (emphasis added).

The federal policy of "respect for the *State's* interest in * * * finality" cannot justify overturning the *State's judgment* as to the strength of that interest in the State's own post-conviction proceedings. Justice Harlan explained:

> The interest in leaving concluded litigation in a state of repose * * * may quite legitimately be found *by those responsible for defining the scope of the writ* to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Mackey, 401 U.S. at 683 (emphasis added). *Teague* reflects *this* Court's judgment as to when finality should prevail under the federal habeas statute that this Court administers. But state courts and legislatures are "responsible for defining the scope of the writ[s]" they provide. *Ibid.* Accordingly, state courts and legislatures may determine for themselves when the interest of "repose * * * outweigh[s] * * * competing interests" in the context of state post-conviction proceedings. *Ibid.* If a State is willing to

sacrifice finality to achieve other, competing state interests, it is hard to see why this Court should stand in its way.

c. *Teague* also identifies a federal interest in uniform treatment of prisoners *by federal courts*. See 489 U.S. at 305 (noting that, under the ad-hoc approach to retroactivity that *Teague* replaced, "lower *federal* courts" had "come to opposite conclusion[s]" about whether habeas petitioners in *federal* court should receive the benefit of a "new" rule). But the Court has never invoked a federal interest in establishing uniformity among state post-conviction procedures.

Of course, States that choose to provide post-conviction remedies must meet certain constitutional minimums. See *Yates* v. *Aiken*, 484 U.S. 211, 217-218 (1988); *Pennsylvania* v. *Finley*, 481 U.S. 551, 556-557 (1987). But, beyond that, a State has always been free to adopt more protective rules than those employed by its sister States or by the federal courts. See *Ramdass* v. *Angelone*, 530 U.S. 156, 177 (2000) ("State trial judges and appellate courts remain free, of course, to experiment by adopting rules that go beyond the minimum requirements of the Constitution."). Nothing in *Teague* or its progeny suggests that the Court intended anything different.

Indeed, even in the federal context, the Court has allowed *dis*uniformity where a State would prefer to waive *Teague* and test its convictions against current constitutional understanding. See *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990); see also *Hopkins* v. *Reeves*, 524 U.S. 88, 94 n.3 (1998) (holding that *Teague* protection may be forfeited if not asserted in a timely manner); *Godinez* v. *Moran*, 509 U.S. 389, 397 n.8 (1993) (same); *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994) (same). It would be odd in light of that allowance in *federal* court to require uniformity across state court systems by forcing the States to adhere to *Teague* in their *own* post-conviction proceedings.

B. History Demonstrates That *Teague* Is Part Of This Court's Longstanding Practice Of Adjusting The Scope Of *Federal*—Not State—Habeas Relief Based On Principles Of Equity

History confirms that *Teague* represents an adjustment to the scope of the federal habeas writ—not an effort to circumscribe state-court authority to grant relief in state post-conviction proceedings. This Court has repeatedly adjusted the scope of federal habeas by invoking principles of equity in order to govern the availability of relief under that writ. *Teague* fits comfortably within that practice. This Court has, by contrast, never taken it upon itself to adjust the scope of *state* writs, much less to cabin state authority in those state proceedings.

1. The habeas writ began in English Law as a "prerogative writ" that could not issue unless a prisoner showed "why the extraordinary power of the crown is called in to the party's assistance." 3 William Blackstone, Commentaries *132 (1768). Since its early days, this Court has asked a similar question. In determining the scope of relief federal habeas should provide, the "Court uniformly has been guided by the proposition that the writ should be available to afford relief to those persons whom society has grievously wronged in light of modern concepts of justice." *Kuhlmann* v. *Wilson*, 477 U.S. 436, 447 (1986) (opinion of Powell, J.) (internal quotation marks and citation omitted). The Court has recognized that the writ is "an extraordinary remedy, a bulwark against convictions that violate fundamental fairness." *Brecht* v. *Abrahamson*, 507 U.S. 619, 633-634 (1993) (quotation marks and citations omitted).

Consistent with the writ's origins as an extraordinary remedy for "intolerable restraints," *Fay* v. *Noia*, 372 U.S. 391, 401-402 (1963), the Court's habeas jurisprudence has, over the centuries, attempted to fine-tune the scope of federal habeas relief to identify those restraints that are indeed "intolerable." For the most part, those adjustments

have had nothing to do with the federal courts' *power* to issue the writ; that power is broad. See *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) (noting that "[n]o doubt exists respecting the power" of this Court to issue the writ; rather "the question is, whether this be a case in which it ought to be exercised."). Instead, the adjustments have been based on principles of equity. That is consistent with the terms of the statute codifying federal habeas authority, which directs federal courts to dispose of petitions "as law *and justice* require," 28 U.S.C. § 2243 (emphasis added), and the nature of the writ itself, which "has traditionally been governed by equitable principles," *Fay*, 372 U.S. at 438; see also *Withrow* v. *Williams*, 507 U.S. 680, 699 (1993) (O'Connor, J., concurring in part and dissenting in part) ("[T]he Court has long recognized that habeas corpus is governed by equitable principles.") (quotation marks and citation omitted); *id.* at 718 (Scalia, J., dissenting) ("[T]his Court's jurisprudence has defined the scope of habeas corpus largely by means of * * * equitable principles.").

The Court acknowledged its authority to adjust the scope of federal habeas in light of equitable principles—including fairness and the federalism principles that govern the "relations existing, under our system of government, between the judicial tribunals of the Union and the states"—over a century ago, in *Ex Parte Royall*, 117 U.S. 241, 251 (1886). In that case, one of the first interpreting the 1867 Habeas Corpus Act (which extended the writ to state prisoners), the Court concluded that federal courts could pay due respect to federalism and comity concerns by declining to provide habeas relief until *after* state proceedings were complete. *Id.* at 251-253.

Since then, the Court has repeatedly determined when, based on those considerations, federal courts should "forgo the exercise of [their] habeas corpus power." *Francis* v. *Henderson*, 425 U.S. 536, 539 (1976). Each time, the Court

has attempted to balance the basic purpose of the writ—to remedy fundamental defects in criminal trials—against countervailing interests held by the State. In *Brecht*, 507 U.S. at 637-639, for example, the Court "balanced" the costs and benefits of applying two different harmless-error standards in federal habeas: the harmless-beyond-a-reasonable-doubt standard of *Chapman* v. *California*, 386 U.S. 18, 24 (1967), and the substantial-and-injurious-effect test of *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). The Court chose the more forgiving *Kotteakos* standard, based on its concern for the State's interest in finality and the risk of "frustrating the State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Brecht*, 507 U.S. at 635. The Court stated that reversing convictions based on a "reasonable possibility" that trial error affected the verdict would be inconsistent with the federal writ's "historic" purpose of offering relief to those "society has 'grievously wronged.'" *Id.* at 637.

That very same Term, in *Withrow* v. *Williams*, *supra*, the Court balanced the very same interests but concluded that they did *not* justify restricting the scope of the writ. The question in *Withrow* was whether *Miranda* claims should be cognizable on federal habeas. The Court held that they should be cognizable both because *Miranda* "serves some value[s]" that are not "necessarily divorced from the correct ascertainment of guilt," 507 U.S. at 692, and because excluding *Miranda* claims would not lessen the "federal-state tensions" created by federal habeas "to an appreciable degree," *id.* at 695.

That sort of balancing of interests, consistent with the equitable nature of the federal habeas writ, is a recurring theme. See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991) (limiting federal habeas review of claims first raised in a second or successive petition in order to "lessen the injury to a State that results through reexamination of a

state conviction" and "to vindicate the State's interest in the finality of its criminal judgments"); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) (requiring petitioners to demonstrate cause and prejudice to obtain review of claims defaulted in state court in order to ensure that the "state trial on the merits [remains] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing"). As the Court summarized in *Reed* v. *Ross*:

> [The Court's] decisions have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated. * * * The more difficult question * * * is: What standards should govern the exercise of the [federal] habeas court's equitable discretion in the use of this power?

468 U.S. 1, 9 (1984).

2. This Court's decision in *Teague* fits comfortably within that practice of recalibrating and refining the scope of the federal habeas writ in light of equitable considerations. As *Teague*'s author has explained (without disagreement from any member of this Court), *Teague*'s rule barring the application of "new" "constitutional rules of criminal procedure * * * on habeas" was derived from the "prudential concerns" of "equity and federalism" that "resonate throughout" the Court's federal habeas jurisprudence. *Withrow*, 507 U.S. at 699 (O'Connor, J., joined by Rehnquist, C.J., concurring in part and dissenting in part); see *id.* at 717 (Scalia, J., joined by Thomas J., dissenting) ("In fashioning this Court's retroactivity doctrine, the plurality in *Teague* * * * relied on equitable considerations."). In particular, *Teague*'s rule about new constitutional rules "validate[s]" state courts' "reasonable interpretations of existing precedents," *Stringer* v. *Black*, 503 U.S. 222, 237 (1992), while attempting to honor the purpose of federal

habeas. By holding States accountable to the constitutional standards recognized at the time the original proceedings took place, *Teague* attempts to leave intact the writ's capacity to deter willful disregard of federal requirements. See *Desist*, 394 U.S. at 263 (Harlan, J., dissenting) ("In order to perform [its] deterrence function, * * * the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."). And by providing limited exceptions for watershed rules and those that ban the criminalization of protected conduct, *Teague* seeks to ensure that the Writ is available for those cases presenting truly "grievous wrongs."

3. The principles of equity that have justified this Court's adjustment of the scope of the federal habeas writ have never been thought to give this Court authority to regulate the scope of *state* post-conviction proceedings. To the contrary, the relevant equitable principles—invoked from *Ex Parte Royall* to *Teague* and its progeny—derive from the equitable nature of the *federal* writ. They cannot justify federal alterations to the scope of state procedures, which may be governed by distinct *state*-law principles.

In fact, any attempt to impose a mandatory federal recalibration of the scope of *state* habeas relief—such as imposing *Teague* on state court proceedings—would be contrary to historical practice. The longstanding history of *state* habeas has been that the States themselves—acting as independent laboratories for justice—set the terms of their post-conviction remedies without interference by this Court. See generally Dallis H. Oaks, *Habeas Corpus in the States*, 32 U. Chi. L. Rev. 243 (1965). It is singularly unlikely that *Teague*—an opinion premised on *respect* for States and state courts—silently transgressed that long-standing practice and broadly constrained state remedial authority under state causes of action. Indeed, given that the States have principal authority for the implementation of their own criminal laws, it is questionable whether this

Court even has authority to limit the States' power to provide relief from their own convictions in the interests of justice—at least not absent a conflict with a recognized constitutional protection for individual liberty (*e.g.*, due process or equal protection).

As *Teague* observed, "retroactivity for cases on collateral review c[an] 'be responsibly [determined] only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise.'" 489 U.S. at 305-306 (quoting *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in judgments in part and dissenting in part)). Where the "adjudicatory process" is federal habeas, this Court is adequately situated to establish a remedial "retroactivity" rule based on its own assessment of the federal habeas writ's "nature, function, and scope." But where the adjudicatory process is a *state* post-conviction process, in a *state* court, and is governed by *state* law, the "nature, function, and scope" of that process—and the propriety of a "retroactivity" or any other relief-limiting rule—is a matter for the States, not the United States, to resolve.

II. THERE IS NO FEDERAL-LAW BASIS FOR REQUIRING APPLICATION OF *TEAGUE* IN STATE POST-CONVICTION PROCEEDINGS

As the foregoing makes clear, *Teague* and the history of state and federal habeas belie the notion that *Teague* was meant to regulate the relief available in state post-conviction proceedings. But even if the Court were now inclined to extend *Teague* that far, it would have no federal-law basis for doing so. "From the beginning of the federal Union, state courts have * * * formulate[d] 'authoritative laws, rules, and remedies' for the trial of * * * [federal] issues." *Chapman*, 386 U.S. at 47 (Harlan, J., dissenting). Setting aside statutory preemption, this Court may not require States to substitute federal rules for their own unless the Constitution requires it, or it is necessary to promote or protect important federal interests. See, *e.g.*,

Dickerson v. *United States*, 530 U.S. 428, 438-439 (2000) ("[F]ederal judges * * * may not require the observance of any special procedures in state courts except when necessary to assure compliance with the dictates of the Federal Constitution.") (internal quotation marks and citation omitted); *Monessen Sw. Ry. Co.* v. *Morgan*, 486 U.S. 330, 336 (1988); *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-363 (1952). Here, there is no plausible constitutional or other federal-law basis for imposing *Teague* to displace state authority over the scope of state collateral relief.[4]

A. Any Effort To Ground *Teague* In The Constitution Contravenes A Traditional View Of The Judicial Power

The *Teague* plurality did not purport to ground the *Teague* rule in the Constitution. Any effort to do so now would require this Court to abandon a traditional understanding of the judicial power under the Constitution.

1. For much of its history, this Court automatically gave its constitutional decisions full effect in criminal cases—both on direct review and in federal habeas proceedings—without any indication that the Constitution might constrain its power to do so. See, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Doughty* v. *Maxwell*, 376 U.S. 202 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Reck* v. *Pate*, 367 U.S. 433 (1961); *Eskridge* v. *Wash. State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958); see also Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: the High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 78 (1965). That practice is consistent with a particular notion of the judicial function—

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[4] There is likewise no basis for concluding that the federal habeas statute that codifies *Teague*, 28 U.S.C. § 2254(d)(1), preempts state law on this issue. That provision, along with the rest of the habeas statute, is addressed exclusively to *federal* habeas.

namely, that judicial decisions do not "make law" as a legislature does, but rather articulate and expound law that already exists. To the extent one accepts the view that constitutional law is immutable, and that it is only the courts' *articulation* of it that changes, it makes no sense to speak of retroactivity as an issue of substantive law. As Justice Scalia has explained in cases addressing retroactivity in the civil context: "Since the Constitution does not change from year to year, since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *American Trucking Assn's* v. *Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment). In other words (*id.*):

> The very framing of the issue [as whether a constitutional rule] shall "*apply*" retroactively * * * presupposes a view of [the Court's] decisions as *creating* the law, as opposed to *declaring* what the law already is. Such a view is contrary to that understanding of "the judicial power," U.S. Const., Art. III, § 1, which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures * * *.

The Court has endorsed that understanding of the judicial function. In *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993), for example, the Court stated that "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions * * * for near a thousand years.'" *Id.* at 94 (quoting *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). In fact, the Court based the "retroactivity" rule that *Harper* announced for civil cases—that "a rule of federal law, once announced * * * must be given full retroactive effect by all courts

adjudicating federal law," 509 U.S. at 96—on the premise that this Court does not enjoy the "quintessentially legislat[ive] prerogative to make rules of law retroactive or prospective as [it] see[s] fit." *Id.* at 95.

2. *Teague*'s ban on "retroactive" application of "new" constitutional rules in federal habeas is consistent with that view of the judicial function *only if* one recognizes that *Teague* is a remedial rule—that it identifies the extraordinary cases that warrant federal post-conviction relief—not a constitutional principle for discerning what the law "was" at some earlier point in time. The plurality in *Teague* itself acknowledged as much when it observed that the question was "*not so much* one of prospectivity or retroactivity of the rule but rather *of the availability of collateral attack* * * * to go behind the otherwise final judgment of conviction." 489 U.S. at 309-310 (emphasis added) (quoting Mishkin, 79 Harv. L. Rev. at 77-78). Thus, *Teague* is best understood as a remedial rule intended to govern the "availability of collateral attack." It does so by foreclosing challenges to otherwise final convictions if the convictions rest on applications of federal law that were objectively reasonable (even if mistaken) in light of the standards recognized at the time.

By contrast, the position advanced by respondent—which seems to assume that *Teague* establishes the substance of federal law at any particular point in time—is directly contrary to a traditional understanding of the judicial function. Noting that a State is forbidden from giving federal constitutional rights any broader meaning than this Court says they have, *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975), respondent insists that *Teague* requires state habeas courts to apply the substantive federal law that existed at the time the conviction became final. See Supp. Br. in Opp. 4. But that view of *Teague*—that it in fact identifies what the law "was"—cannot possibly be reconciled with a view of "the judicial power," U.S. Const.

Art. III, § 1, under which the Court's decisions do not "creat[e] the law" but simply "declar[e] what the law already is"—and always has been. *Smith*, 496 U.S. at 201 (Scalia, J., concurring in the judgment).

To be sure, the members of this Court have not always uniformly endorsed the traditional understanding of the judicial function described by Justice Scalia in *Smith*, *supra*. See, *e.g.*, *Harper*, 509 U.S. at 116-117 (O'Connor, J., dissenting) (urging that the Court ought not "indulge in the fiction that the law now announced has always been the law") (quoting *Griffin* v. *Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in the judgment)); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 546 (1991) (White, J., concurring in the judgment) (rejecting the notion that judges do not "in a real sense 'make' law"). For present purposes, however, it is sufficient that respondent's position appears to rely on a view—that this Court's decisions make law rather than discern it—that has been rejected by many of the Court's members. Given that, it is unlikely that *Teague* was or should be understood as articulating a rule about what the substance of federal law is or was at any point in time. Instead, *Teague* is best understood as a remedial principle federal courts use to identify those convictions that present such an "intolerable restraint" that the extraordinary remedy of federal habeas is warranted.

There is no general provision of the Constitution that says that "new" rules of criminal procedure cannot be given retroactive effect unless they meet the circumscribed criteria set forth in *Teague*. Nor is there anything about the substantive rights themselves that would seem to require that certain violations may be remedied and others may not, depending on when they occurred or the posture in which they are raised. Nowhere, for example, does the Sixth Amendment say that the right of confrontation has different meanings at different times or stages of litigation.

Rather, this Court has chosen, *in an exercise of discretion*, to limit the relief that will be provided in *federal* habeas proceedings for "new" rule violations. See pp. 8-19, *supra*. Nothing in the Constitution, however, prohibits the *States* from "provid[ing] greater protections in their criminal justice system" if they so choose. *California* v. *Ramos*, 463 U.S. 992, 1014 (1983).

Teague, in short, is not a substantive rule for deciding whether constitutional error occurred. No one would deny, for example, that Danforth's Confrontation Clause rights *were in fact violated* by the admission of the videotaped statement against him. Rather, *Teague* is a rule that seeks to determine whether a constitutional error is of the sort that should be *remedied* on federal habeas. No aspect of federal law precludes States from using a different rule for that purpose in their own post-conviction proceedings.

3. The history of "retroactivity" in federal habeas confirms that *Teague* represents a remedial, not a constitutional rule. As noted above, until the 1960s, this Court applied—and required federal courts to apply—their best current understanding of federal law when resolving federal habeas claims. See generally Mishkin, 79 Harv. L. Rev. at 78 ("[P]rior to *Linkletter*, the criteria applied in federal habeas corpus proceedings were uniformly the constitutional standards in effect at the time of those proceedings, regardless of when the conviction was actually entered."). It was only the broadened scope of federal habeas ushered in by *Fay* v. *Noia*, *supra*, and the rapid expansion of federal constitutional rights during that era, that caused this Court to reconsider whether federal habeas relief should be available for all violations of "new" constitutional rules. But the Court never intimated that the limitations on "retroactivity" ultimately imposed were mandated by previously overlooked provisions of the Constitution.

To the contrary, when the Court announced its first retroactivity rule in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Court declared that "the Constitution neither prohibits nor requires retrospective effect," *id.* at 629, and that its decision was based instead on "the accepted rule today * * * that in appropriate cases the Court may *in the interest of justice* make the rule prospective [only]." *Id.* at 628 (emphasis added). *Teague* eventually discarded the *Linkletter* standard for Justice Harlan's approach. But in so doing the Court never suggested that it adopted a new approach to "retroactivity" because the Constitution commanded it.

B. There Are No Federal Interests That Warrant Imposition Of *Teague* Upon The States

Even in the absence of constitutional command, this Court has the authority to limit the scope of state habeas where necessary to protect federal interests. The Court has, for example, held that state courts may not issue writs of habeas corpus for federal prisoners. See *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1858); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871). But neither *Teague* nor its progeny identifies any *federal* interest for its "retroactivity" rule that would displace the States' remedial principles with one of this Court's choosing. See pp. 10-14, *supra*. To the contrary, the purpose of *Teague* is to protect state interests *from* federal-court interference. See pp. 10-12, *supra*. Forcing state courts to apply *Teague* against their will cannot possibly be reconciled with that rationale. A State might well give concerns regarding finality and uniformity the same weight this Court did in *Teague* and, as a result, adopt a *Teague*-like rule for its own post-conviction proceedings. But, consistent with *Teague*'s purpose of protecting States *from* federal intrusions, whether and how to strike the balance for state writs in state courts is for the States themselves to decide.

C. The Court's Civil Retroactivity Jurisprudence Does Not Compel Application Of *Teague* In State-Court Proceedings

The Minnesota Supreme Court, for its part, recognized that "*Teague*'s framework is based, in part, on concerns unique to federal habeas corpus proceedings." J.A. 47. And it noted that, for that reason, numerous state courts have concluded that *Teague* does not apply in state post-conviction proceedings. *Ibid.* Nonetheless, it construed this Court's civil retroactivity cases as compelling it to apply *Teague* on state habeas. It relied in particular on the plurality opinion in *American Trucking Assn's* v. *Smith*, *supra*, and the plurality's statement that this Court has "consistently required that state courts adhere to [its] retroactivity decisions." J.A. 45 (quoting 496 U.S. at 178 (opinion of O'Connor, J.)).

That reliance was misplaced. The plurality in *Smith* did conclude that state courts conducting *direct review in civil matters* were bound to apply the "retroactivity" standard this Court had articulated in *Chevron Oil* v. *Huson*, 404 U.S. 97 (1971). Under the *Chevron Oil* test, courts were to consider equitable factors, such as reasonable reliance on then-existing precedent, when resolving whether to give retroactive effect to a decision announcing a "new" principle of law. See *id.* at 106-108. The plurality in *Smith* noted that "[t]he determination [of] whether a constitutional decision of this Court is retroactive—that is whether [it] applies to conduct or events that occurred before the date of the decision—is a matter of federal law." 496 U.S. at 177. And, it characterized *Chevron Oil* as establishing a mandatory choice-of-law rule that required all courts, state and federal, to weigh the equities in deciding whether old or new federal law should apply. *Id.* at 177-178, 191.

But that conclusion was not endorsed by a majority of this Court. And it was not long thereafter that the plurality's position in *Smith* was rejected. As noted above,

Harper v. *Virginia Department of Taxation* rejected the plurality's view in *Smith* and overruled *Chevron Oil*, declaring that "[w]hen this Court applies a rule of federal law to the parties before it, that rule * * * must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97. In so holding, the Court adopted Justice Souter's position in *James B. Beam Distilling Co.* v. *Georgia*, *supra*, that "the substantive law [cannot be permitted to] shift and spring" according to "the particular equities" of a case. *Id.* at 97 (quoting *James B. Beam Distilling Co.*, 501 U.S. at 543 (opinion of Souter, J.)). Finally, the Court indicated that equitable factors are properly considered (if at all) *at the remedial stage*, at which point state law (subject to certain constitutional minimums) controls. See *Harper*, 509 U.S. at 100-102; cf. *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295-297 (1970) (Harlan, J., concurring)) ("To the extent that equitable considerations, for example, 'reliance,' are relevant, I would take this into account in the determination of what relief is appropriate in any given case.").

Given *Harper* and related developments in this Court's retroactivity jurisprudence, *Teague* is most naturally understood not as a "retroactivity decision" that the States are required to follow, but as a remedial rule—derived from equitable considerations governing federal habeas—that binds federal courts alone. *Teague* does, no doubt, speak in terms of retroactivity. But in *Teague* itself, the plurality acknowledged that the problem it confronted was "not so much" one of "retroactivity" as when "collateral attack[s]" should be permitted in federal court. 489 U.S. at 310-311; see p. 22, *supra*; see also Richard H. Fallon, Jr. *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System* 74 (5th ed. 2003) ("After a conviction has been obtained, aren't questions of entitlement to reversal, on the basis of newly propounded rules or otherwise, questions about the

necessary or appropriate availability of constitutional remedies?"). And when Congress enacted AEDPA, codifying (in part) *Teague*'s limit on the scope of federal habeas relief, it found no need to replicate the language of retroactivity. Instead, it merely specified (as *Teague* had in defining "new" rules) that federal habeas relief is available only if a state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law * * *." 28 U.S.C. § 2254(d)(1); see *Williams* v. *Taylor*, 529 U.S. 362, 380 (2000) ("AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.") (opinion of Stevens, J.).

Moreover, as Justice Stevens observed in his *Smith* dissent, the term "retroactivity" has had *two* meanings in this Court's jurisprudence: "retroactivity" as a choice-of-law rule and "retroactivity" as a remedial principle. 496 U.S. at 210-211; see also *James B. Beam Distilling Co.*, 501 U.S. at 534-535 (opinion of Souter, J.); *Harper*, 509 U.S. at 95 n.9. Choice-of-law rules address substantive federal law—*i.e.*, what the law is—and are binding on state courts. Remedial principles, which limit the *relief* a federal court should provide, generally are not. *Smith*, 496 U.S. at 210-211 (Stevens, J., dissenting). Instead, "[t]he remedial effect a decision of federal constitutional law should be given is in the first instance a matter of state law." *Id.* at 210.[5]

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[5] While federal law "does not ordinarily limit the State's power to give a decision [of this Court] remedial effect *greater* than that which a federal court would provide," it does "constrain[] the *minimum* remedy a State may provide." *Smith*, 496 U.S. at 210 (Stevens, J., dissenting) (emphasis added) (citing cases). The Court has no need in this case to decide whether the exceptions to *Teague*'s general rule are a "constrain[t] on the minimum remedy a State may provide" in its habeas actions. It bears noting, however, that where a State chooses to provide a habeas remedy, those proceedings must comply with norms of due process, see

Far from rejecting the basic distinction between choice-of-law rules and remedial principles, *Harper* confirms that *Teague* is best understood as falling into the latter category. *Harper* rejects the notion implicit in the *Smith* plurality opinion that the substance of the law can "shift and spring" based on equitable considerations. 509 U.S. at 97; see *Smith*, 496 U.S. at 219 (Stevens, J., dissenting) (rejecting as anomalous the notion that the "law applicable to a particular case is that law which the parties believe in good faith to be applicable to the case"). Given *Harper*, the Minnesota Supreme Court erred in invoking a conception of retroactivity from the *Smith* plurality opinion; that plurality view, quite simply, has long since been rejected by the Court as a whole.[6]

To be clear, States may *choose* to limit the availability of their own post-conviction remedies in their own courts, as this Court has limited the availability of federal habeas relief. But history, this Court's precedents, and the reasoning of *Teague* itself all make clear that any such decision is for the States themselves to make.[7]

Yates, 484 U.S. at 217-218, upon which the *Teague* exceptions appear to be based, see *Mackey*, 401 U.S. at 692-693 (Harlan, J., concurring in part and dissenting in part).

[6] In *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749 (1995), the Court stated (in dictum) that *Teague* "does not involve a special 'remedial' limitation on the principle of 'retroactivity' as much as it reflects a limitation inherent in the principle itself." *Id.* at 758. But if the law always has been what it is today—and the courts declare it rather than make it—then the only reason for limiting the "retroactivity" of any particular decision is the conclusion that certain violations, for reasons of fairness, do not warrant a remedy. In any event, *Reynoldsville Casket* recognized that *Teague* "embodies certain special concerns * * * related to collateral review of state criminal convictions." *Id.* As noted above, *supra* pp. 10-14, those "special concerns" cut against, not in favor of, imposing *Teague* on the States.

[7] The Minnesota Supreme Court also relied on *Michigan* v. *Payne*, 412 U.S. 47 (1973). As Justice Stevens explained in his dissent in *Smith*,

CONCLUSION

For the foregoing reasons, the judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

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"*Payne* does not stand for the expansive proposition that federal law limits the relief a State may provide [for constitutional violations], but only for the more narrow proposition that a state court's decision that a particular remedy is *constitutionally required* is itself a federal question." 496 U.S. at 210 n.4 (emphasis added). In *Payne*, the state court had concluded on direct review that it was bound, as a matter of federal law, to give retroactive effect to the prophylactic rule announced in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). This Court—which had not yet decided *Griffith* v. *Kentucky*, 479 U.S. 314 (1987)—held that retroactivity was not required under federal law. As the Minnesota Supreme Court acknowledged, *Payne* did not "explicitly address[] retroactivity principles in state postconviction proceedings." J.A. 46. And *Payne* certainly did not hold that federal law restricts the relief state habeas courts may choose to provide under state law for past violations of "new" constitutional rules.